No.

In the Supreme Court of the United States

VLADIMIR SHEKOYAN,

Petitioner

v.

SIBLEY INTERNATIONAL, INC.,

Respondent.

ON PETITION FOR WRIT OF *CERTIORARI*
TO THE UNITED STATES COURT OF APPEALS
FOR THE D.C. CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

A. What is the definition of a "U.S. national," in the context of employment, immigration, criminal and/or tort law?

B. Does *Spector v. Norwegian Cruise Lines*, 125 S. Ct. 2169 (2005), require the extra-territorial application of U.S. law where U.S. nationals are affected and application will not result in a conflict of law?

C. Does Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000(e) protect a permanent legal resident of the United States, classified as a U.S. national, from employment discrimination while s/he is temporarily assigned abroad, to fulfill a U.S. government contract/mission?

D. Is an employee protected by the False Claims Act ("Whistleblower Act"), if he reports suspected misuse of government funds to his/her supervisors, or must s/he report the suspected misuse directly to the U.S. government to invoke the statute?

E. Under the abuse of discretion review standard, may an appellate court simply defer to the discretion of the trial court, without an independent analysis of the facts or the law?

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U.S. Court of Appeals for the D.C. Circuit

On June 3, 2005, the United States Court of Appeals for the D.C. Circuit affirmed the District Court's decisions of August 19, 2002, January 26, 2004 and March 19, 2004. *Shekoyan v. Sibley International, Inc.*, 409 F.3d 414 (App. 2) On September 9, 2005, the Court denied Mr. Shekoyan's motions for a rehearing 2005 U.S. App. LEXIS 19630 (App. 20) and rehearing *en banc.* (D.C. Cir. 2005) (App. 21)

Opinions of the District Court

1. August 19, 2002 Decision

On August 19, 2002, the District Court denied Sibley International's *Motion to Dismiss* Mr. Shekoyan's False Claims Act Claim, but granted Sibley's *Motion to Dismiss* Mr. Shekoyan's claims filed under Title VII of the Civil Rights Act of 1964, on jurisdictional grounds. 217 F. Supp. 2d 59 (D.C. 2002) (App. 22)

2. January 26, 2004 Order

On January 15, 2003, Shekoyan filed a *Motion to Amend the Court's August 19, 2002 Order.* On January 26, 2004, the district court denied Shekoyan's motion. (App. 51)

3. March 19, 2004 Decision

On March 19, 2004, the district court issued a final order, dismissing Mr. Shekoyan's False Claims Act claims and declining to exercise jurisdiction over his pendant D.C. claims. 309 F. Supp. 2d 9 (D.D.C. 2004) (App. 62).

JURISDICTION

The judgment of the court of appeals was entered on June 3, 2005. (App. 2) The court of appeals denied rehearing *en ban* on September 9, 2005. (App. 20). This Court has jurisdiction pursuant to 28 U.S.C. 1254(1).

STATUTES AND REGULATIONS

See Addendum.

STATEMENT OF THE CASE

Sibley, a U.S. corporation headquartered in Washington, D.C., was awarded a contract with the U.S. government, the United States Agency for International Development (USAID), a division of the Department of State, to implement the "GEAR" (Georgia Accounting Reform) Project, primarily to train accountants in the Republic of Georgia, formerly part of the Soviet Union. [Facts ¶¶3-4] Mr. Shekoyan, then a legal permanent resident of the United States, living in Washington, D.C. with his wife, also a legal permanent resident of the United States, responded to an advertisement in the Washington Post for a position as a Chief Financial Officer to work in Sibley's Washington, D.C. headquarters. [Facts ¶¶1-4]

Sibley did not hire Mr. Shekoyan for the advertised Chief Financial Officer position, but did hire him, with his first assignment as a Senior Training Advisor for the GEAR Project. [Facts ¶¶1-4]. Sibley promised Mr. Shekoyan that after the GEAR Project ended, it would assign him back to its D.C. headquarters. (Facts ¶ 8)

Mr. Shekoyan is now a naturalized American citizen. [Facts ¶1] He was born in Armenia, of parents born in the Republic of Georgia. Armenia and Georgia are neighboring Republics, formerly of the Soviet Union. At the time of his employment with Sibley, from 1997 through 1999, Mr. Shekoyan was a legal permanent U.S. resident, waiting out his five-year legal residency requirement before he could apply for citizenship. [Facts ¶¶1-2; S. Facts ¶¶ 25-26] Mr. Shekoyan began his employment in Washington, D.C., at Sibley headquarters, where he worked and was trained for several weeks. [Facts ¶18]

Sibley assigned Mr. Shekoyan to the Republic of Georgia to implement the GEAR Project, pursuant to a U.S. government contract. [Facts ¶¶16, 20, 28, 29] While Mr. Shekoyan was stationed in the Republic of Georgia, his wife

remained in their Washington, D.C. home. [Facts ¶¶18-19] Sibley deducted U.S. and D.C. income taxes from Mr. Shekoyan's paychecks and sent them to his D.C. residence and/or his D.C. bank. [Facts ¶ 22]

Mr. Shekoyan was a U.S. national, pursuant to a USAID regulation, 48 C.F.R. § 702.170-16: "U.S. national" ('USN') is "an individual who is a U.S. citizen or a non-U.S. citizen lawfully admitted for permanent residence in the United States." USAID and Sibley specifically classified Mr. Shekoyan as a "U.S. national," rather than as a "third country national (or Armenian)" throughout his employment with Sibley. [Facts ¶ 28]

Mr. Shekoyan performed the duties of every "U.S. national" position on the GEAR Project, including Acting "Chief of Party," or Project Manager. [Facts ¶¶ 39-42] His work was highly praised. [*Id.*] In mid-June of 1999, once Jack Reynolds joined the project as the Project Manager, or "Chief of Party" [Facts ¶ 52], Reynolds created a hostile work environment for Mr. Shekoyan, on the basis of his national origin. [Facts ¶ 53-58, 65, 67-71, 77-80, 90] Jack Reynolds repeatedly told Mr. Shekoyan and other persons that Mr. Shekoyan was not a "real" American. [Facts ¶ 54] Reynolds repeatedly mocked Mr. Shekoyan's accent [Facts ¶ 54] and made derogatory comments about people from the former Soviet Union, particularly Georgians. [Facts ¶ 55] Reynolds treated Mr. Shekoyan with extreme disrespect and denied him resources available to other employees to complete their work. [Facts ¶¶ 58] Reynolds also attempted to alienate Mr. Shekoyan from his co-workers. [Facts ¶¶ 58]

Mr. Shekoyan repeatedly informed Sibley officials in D.C. headquarters that Reynolds was harassing him. [Facts ¶¶ 68, 69, 71] Mr. Shekoyan also reported his concerns that USAID resources were being used by Sibley employees/contractors for their own personal and/or business purposes. [Facts ¶¶ 72-74] Sibley's Vice President told Mr.

Shekoyan not to "make too much noise" (Facts ¶ 72) and to work the problems out locally, since D.C. headquarters was busy getting the project extended. [Facts ¶ 71]

Immediately after receiving approval from USAID to extend the project, in October of 1999, Sibley fired Mr. Shekoyan and refused to provide him with a reference. [Facts ¶ 76] Sibley's President, Donna Sibley told officials at USAID, *in writing*, that Mr. Shekoyan was terminated for being insubordinate to Jack Reynolds, based only on the word of Jack Reynolds, which was vehemently disputed by Mr. Shekoyan and documentation submitted to Sibley officials by Mr. Shekoyan. [Facts ¶ 76-77, 82-83, 90-96]

Since his termination from Sibley, Mr. Shekoyan has been unable to secure employment in his field [Facts ¶ 101-103], despite a Ph.D in Finance and his experience with World Bank, finance, and accounting internationally. [Facts ¶ 37] Mr. Shekoyan is currently employed as a cashier at Safeway to help support his family, including his wife and young son. [Facts ¶ 105]

On October 20, 2000, Mr. Shekoyan filed suit, pursuant to Title VII of the Civil Rights Act of 1964, as amended by the Civil Rights Act of 1991, alleging employment discrimination on the basis of national origin. Mr. Shekoyan also sued under the False Claims, or "whistleblower" Act, for retaliatory termination for his reports to Sibley headquarters of evidence of misuse of U.S. government funds.

During the four years of litigation in federal district court, the court dismissed Mr. Shekoyan's Title VII claims for jurisdictional reasons, his False Claims Act claims on the merits, and declined to assert jurisdiction over Mr. Shekoyan's D.C. claims, forcing him to file his remaining claims anew in D.C. Superior Court, under the D.C. Human Rights Act, contract law and tort law, including claims of defamation and intentional infliction of emotional distress.

Mr. Shekoyan appealed. On June 3, 2005, the Court of Appeals for the D.C. Circuit affirmed the district court's decisions. Dispositive motions are pending in D.C. Superior Court. No trial date has been set.

REASONS FOR GRANTING THE *WRIT*

I. *Shekoyan v. Sibley Int'l Corp.*, 217 F. Supp. 2d 59 (D.D.C. 2002) Incorrectly Defines "U.S. National"

Shekoyan involves questions of national and international importance, as well as resolve conflict within the circuits. Under the doctrine of nationality jurisdiction, a country may assert jurisdiction over its nationals outside of the nation's borders to wherever these subjects may be in the world. *Blackmer v. United States*, 284 U.S. 421, 437-438 (1932), reiterated in *Steele v. Bullova Watch Co.*, 344 U.S. 280, 255-256 (1953). As a "U.S. national," Mr. Shekoyan is regulated and protected by U.S. law, even when he was temporarily working abroad.

The definition of "U.S. national" spans far beyond *Shekoyan* and even the employment discrimination context – it may be the deciding factor in cases of international conflict, immigration law, deportation proceedings and even the U.S.' ability to enforce its criminal laws abroad for crimes against U.S. nationals.[1] It may determine whether a person is admitted into this country, permitted to stay, or protected against crimes and tortuous conduct while traveling abroad. Particularly in these times of international terrorism, the definition of a "U.S. national" could determine whether life or death. A clear definition of "U.S. national" is sorely needed to protect the rights of U.S. nationals abroad, where they are awaiting U.S. citizenship.

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[1] E.g. *United States v. Wharton*, 320 F.3d 526 (5th Cir. 2003) (enforcement of the "foreign murder" statute, allowing the U.S. to convict a U.S. national for the murder of another U.S. national, while abroad).

A "U.S. national" is a person who is a citizen of the United States *or* "a person, though not a citizen of the United States, who holds a permanent allegiance to the United States. 8 U.S.C. § 1101(a)(22) The district court erroneously determined, as a matter of law, that a legal permanent resident of the U.S. cannot be a U.S. national if he/she has not yet applied for citizenship. 217 F. Supp. at 66 (D.D.C. 2002) The district court arrived at this conclusion by reasoning that the best evidence of "a permanent allegiance to the United States" is whether the person has applied for U.S. citizenship; however, the district court failed to recognize that a legal permanent resident *is not permitted* to apply for citizenship until he/she has been a legal permanent resident for five years and that Mr. Shekoyan had only not yet been in the country for five years.

After the August 19, 2002 decision, Sibley admitted that Mr. Shekoyan *was* a "U.S. national" during his Sibley employment. Government records produced in discovery disclosed that the U.S. Department of State, USAID, specifically classified Mr. Shekoyan as a "U.S. national," rather than a "third country national" (or Armenian) [Facts ¶ 28], in accordance with USAID Regulations, 48 C.F.R. § 702.170-16. The courts are bound by a determination of the Department of State that an alien claiming diplomatic status is entitled to that status, since this is construed as a nonreviewable political decision. *United States v. Enger*, 472 F. Supp. 490, 506 (D.N.J. 1978), citing *In re Baiz*, 135 U.S. 403, 10 S. Ct. 854, 34 L. Ed. 222 (1890); *Sullivan v. State of Sao Paulo*, 122 F.2d 355, 357-58 (2d Cir. 1941); *United States v. Coplon*, 84 F. Supp. 472, 475 (S.D.N.Y.1949). Similary, the definition of a "U.S. national" is a political decision. The courts should be similarly bound by the State Department's definition of a "U.S. national."

In an unpublished January 26, 2004 decision, page 6, denying Mr. Shekoyan's *Motion to Amend the Court's August 19, 2002 Based on Evidence Produced in Discovery*,

the district court conceded that Mr. Shekoyan may well have been a "U.S. national" during his employment with Sibley after all; yet, because the August 19, 2002 decision has not been specifically amended, the erroneous legal holding is being perpetuated by other courts. *E.g.*, *Asemani v. The Islamic Republic of Iran*, 266 F. Supp. 24 (D.D.C. 2003).

In the absence of a statute clearly defining a person as a "U.S. national," courts have resorted to creating their own definitions – not necessarily consistent with each other – and some of which directly conflict with U.S. Department of State regulations, defining U.S. nationals as permanent legal residents of the United States. Other courts have held that the "test" for determining whether a non-U.S. citizen is a U.S. national is whether s/he applied for U.S. citizenship. *Asemani v. The Islamic Republic of Iran*, 266 F. Supp. 24 (D.D.C. 2003); *Oliver v. U.S. Dep't of Justice*, 517 F.2d 426, 428 n.3 (2d Cir. 1975); *Carreon-Hernandez v. Levi*, 543 F.2d 637 (8th Cir. 1976); *Hughes v. Ashcroft*, 255 F.3d 752, 756-57(9th Cir. 2001); *U.S. v. Morin*, 80 F.3d 124, 126 (4th Cir. 1996). In contrast, the Second and Ninth Circuits hold that a person can only be a U.S. national by birth or official, naturalized citizenship and that a citizenship application is irrelevant. *Marquez-Almanzar v. INS*, 418 F.3d 210 (2d Cir. 2005); *Theagene v. Gonzales*, 411 F.3d 1107 (9th Cir. 2005). *Both* definitions conflict with the U.S. Department of State Regulations, defining a U.S. national as a legal permanent resident of the United States. 48 CFR § 702.170-16. Only this Court can resolve this conflict.

II. Title VII of the Civil Rights Act of 1964 Applies to the Sibley-Shekoyan Relationship

A. Shekoyan Requires a Delicate Blend of International and U.S. Equal Employment Law

Mr. Shekoyan's petition for *certiorari* involves questions of fundamental civil rights. If U.S. courts deny Mr. Shekoyan Title VII protection, he is left as a "man without a country." Sibley employees were all granted diplomatic

immunity, and therefore could not be sued in the Republic of Georgia. If U.S. courts will not hear Mr. Shekoyan's claims, then his contract with Sibley was completely meaningless – null and void – as unenforceable in any court in the world. Thus far, U.S. have told Mr. Shekoyan that he must pay income taxes to the country of his residence, but that he may not benefit from the laws that his taxes help finance. Certainly, neither the law nor policy considerations can support such an unjust result.

The national and international civil rights and jurisdictional issues involved in this case are compelling and precedent-setting, resting upon a delicate blend of international law and U.S. equal employment law.

It is the first case to explicitly consider whether Title VII covers a "U.S. national" hired by a U.S. employer to work a foreign country. *Shekoyan* is the logical case to resolve questions left lingering after *EEOC v. Aramco,* 499 U.S. 244 (1991) and the subsequent 1991 Civil Rights Act. *Aramco* held that Title VII did not apply to U.S. citizens assigned abroad, employed by U.S. corporations. Congress amended Title VII, extending coverage to U.S. citizens assigned abroad by U.S. companies. 42 U.S.C. § 2000(e)-1(f)) (1991) *Shekoyan* is the "stepchild" of the 1991 Civil Rights Act and could well result in a new Title VII amendment; it addresses the overlooked class of persons who are U.S. nationals, but not yet U.S. citizens, assigned abroad by U.S. companies.

This High Court examined some of the issues presented in *Shekoyan* when it decided *Spector v. Norwegian Cruise Lines*, 125 S. Ct. 2169 (2005), with addressing the extra-territorial application of the *Americans with Disabilities Act* with respect to public accommodations. The *Spector* analysis is quite similar to that set forth in *Torrico v. IBM,* 2004 U.S. Dist. LEXIS 3691 (S.D.N.Y. 2004), 213 F. Supp. 2d 390 (S.D.N.Y. 2002). *Torrico* examined whether the "center of gravity" of the employment relationship was in the

U.S. or in Chile. If the totality of the circumstances indicated that the "center of gravity" of the employment was the United States, then Title VII applied to the relationship, as an exercise of *territorial*, rather than *nationality*, jurisdiction. In holding that Mr. Shekoyan was not protected by Title VII (409 F.3d at 421), the appellate court relied upon *Hu v. Skadden*, 76 F. Supp. 2d 476 (S.D.N.Y. 1999), ignoring *Torrico*'s express rejection of the "oversimplified" analysis in *Hu*. *Torrico*, 213 F. Supp. 2d at 405. This Court's analysis in *Spector* has not yet been applied to Title VII. *Shekoyan* and *Torrico*[2] represent opposing analyses regarding the extraterritorial application of Title VII. Mr. Shekoyan respectfully requests that this Court resolve the conflict.

B. The U.S. has a Valid Interest in Prohibiting Discrimination Committed within its Territory

1. Discrimination Committed in the U.S.

The U.S. has a substantial interest in preventing U.S. employers from discriminating when they make decisions in the U.S. regarding employees that they have assigned abroad. Since employment may transcend state and national boundaries, the jurisdiction may assert its employment discrimination laws over an employer if even one of the discriminatory acts took place in that jurisdiction. *Mota v. University of Texas Houston Health Science Center*, 261 F.3d 512 (5th Cir. 2001); *Blake v. Professional Travel Corp.*, 786 A.2d at 574 (D.C. App. 2001); *Quarles v. General Investment & Development Co.*, 2003 U.S. Dist. LEXIS 3962 (DDC 2003); *Martin v. Holiday Universal, Inc.* 1990 U.S. Dist. LEXIS 18102 (DDC 1990). Even if Mr. Shekoyan's

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[2] The recent case of *Ofori-Tenkorang v. American International Group, Inc.*, 2005 U.S. Dist. LEXIS 20415 (SDNY 2005) highlights the need for this Court's clarification regarding Title VII coverage. Even within the same Court, the District Court for the Southern District of New York, litigants cannot predict whether Title VII will be applied to U.S. legal permanent residents. Three judges, on the same court, deciding *Hu*, *Torrico* and *Ofori-Tenkorang*, have applied different analyses.

termination was the *only* discriminatory act that occurred in the U.S., the entire case is subject to Title VII. (Id.)

On August 19, 2002, the district court *upheld* Mr. Shekoyan's False Claims Act claim, extending U.S. law to the Shekoyan-Sibley employment relationship, based on its finding that his termination took place in Washington, D.C. *Shekoyan*, 217 F. Supp. 2d at 73, fn. 12.[3] In her deposition, Sibley's President, Donna Sibley, confirmed that Mr. Shekoyan was not terminated by Reynolds in Georgia, but by her in Washington, D.C. Ms. Sibley also admitted that Sibley EEO matters could only be handled by her, in D.C. Ms. Sibley testified that Sibley had no EEO procedures in place during Mr. Shekoyan's employment. Ms. Sibley could not explain Sibley's EEO policy, even at the time of her deposition. Ms. Sibley further admitted that she refused to accept Mr. Shekoyan's calls after he first complained about Reynolds. Ms. Sibley decided not to continue Shekoyan's employment after the GEAR Project or to provide him a reference. Sibley has since advertised to recruit applicants for various positions for which Mr. Shekoyan was well qualified, but has never offered him a position.

2. **U.S. "Diplomats" Remain on U.S. Soil**

While working for Sibley abroad, Mr. Shekoyan was a U.S. diplomat, pursuant to the Vienna Convention of 1961, 23 U.S.T. 3227, Article 3(e). Mr. Shekoyan's "Service Card," administered by the Ministry of Foreign Affairs of Georgia Diplomatic Protocol Department, specifically granted him, as a representative of the "USA's Agency for Assistance," the "privileges and immunities provided for diplomatic representatives in accordance with the Vienna Convention on Diplomatic Relations of April 16, 1961." Diplomatic immunity will not be conferred upon an individual unless he has both diplomatic status and an

[3] Shekoyan's termination letter was sent *from Sibley* to his permanent residence in Washington, D.C. – never leaving D.C.

intimate association with the work of a permanent diplomatic mission. *United States v. Enger*, 472 F. Supp. 490.

A U.S. diplomat, though physically in a foreign country, figuratively, always has U.S. soil under his/her feet. Sibley sent Mr. Shekoyan to the Republic of Georgia, in concert with the U.S. government, to implement a mission of the U.S. government, the GEAR Project. As a U.S. diplomat, Mr. Shekoyan performed his work for Sibley while standing on U.S. "soil" or territory; therefore, there is no issue of extraterritoriality. Sibley discriminated against Mr. Shekoyan within U.S. territory is subject to Title VII.

3. U.S. "Missions" are U.S. Territories

Mr. Shekoyan's workplace was territory of the U.S., as a U.S diplomatic mission in Georgia, pursuant to the Vienna Convention of 1961, Articles 20, 21, 22 and 23. The physical premises used to implement the U.S. mission are not considered territories of the host country, but are, rather, U.S. territories, as are U.S. embassies. *United States v. Corey,* 232 F.3d 1166 (9th Cir. 2000), *citing* ***United States*** v. *County of Arlington*, 702 F.2d 485 (4th Cir. 1983). Mr. Shekoyan was therefore employed in a U.S. territory and is protected by Title VII.

C. Congress Intended Title VII to Apply Extra-Territorially

The appellate court refused to consider the legislative history of the 1991 Civil Rights Act, Congress' purpose and reasoning for overturning the Supreme Court's decision in *Aramco*, the purpose of Title VII's "alien exemption" and/or the "spirit" of extending Title VII to encompass all persons within U.S. jurisdiction.[4]

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[4] The U.S. Equal Employment Opportunity Commission and legal commentators urge that U.S. statutes prohibiting employment discrimination or abuses be asserted when there is authority to do so and there is no issue of conflicts of international law. EEOC Policy Guidance EEOC Policy Guidance No. 915.002, CCH Employment Practices Guide

The appellate court adopted the district court's conclusion that the 1991 Amendment was restrictive, limiting Title VII jurisdiction abroad only to U.S. citizens; however, there is no basis for such a conclusion. The 1991 Amendment specifically included "U.S. citizens" because the facts in *Aramco* only involved U.S. citizens. The appellate court determined that Congress left intact the entire *reasoning* of *Aramco*, while rejecting its *holding*; however, the legislative history demonstrates that Congress rejected both the holding and the restrictive reasoning of *Aramco*, adopting instead the reasoning in the dissent of Justice Thurgood Marshall, 499 U.S. 244, 255-266:

(EPG) ¶ 6866, *Enforcement Guidance on Application of Title VII and the Americans with Disabilities Act to Conduct Overseas and to Foreign Employers Discriminating in the United States*; EEOC Decision 90-1, CCH EPG ¶ 6875, *Title VII Covers Military Contractor's Employment of Americans Overseas*; Todd Keithley, *Note: Does the National Labor Relations Act Extend to Amerians who are Temporarily Abroad?* 105 Colum. L. Rev. 2135; Olivia P. Dirig and Mahra Saraofsky, *The 40th Anniversay of Title VIII of the Civil Rights Act of 1964: Symposium: Note: The Argument for Making American Judicial Remedies under Title VII Available to Foreign Nationals Employed by U.S. Companies on Foreign Soil*, 22 Hofstra Lab. & Emp. L.J. 709 (Spring 2005); Robert Stulberg and Amy F. Shulman, *Employment Law Issues in the Global Economy: Representing Americans Employed Abroad: The Extraterritorial Application of Federal and State Anti-Discrimination Laws*, 11 ILSA J Int'l & Comp. L 421 (Spring 2005); Michelle Shender, *Casenote: Claims by Non-Citizens under the Americans with Disabilities Act: Proper Extraterritorial Application in Torrico v. International Business Machines?* 17 Pace Int.'l L. Rev 131 (Spring 2005); Ruhe C. Wadud , *Allowing Employers to Discriminate in the Hiring Process under the Age Discrimination in Employment Act: the Case of Reyes-Goana*, 27 N.C.J. Intil L. & Com. Reg. 335 (2001); Street, Lairold, *Application of U.S.* Fair Employment Laws to Transnational Employers in the United States and Abroad, 19 NYU J. Int'l. Law and Politics, 357 (1987); Street, Lairold, Korean Air Lines: The Future Interpretation of "Executive" and "Engage" in Friendship, Commerce and Navigation Treaties, 14 Hastings Int'l. & Comp. L. Rev. 93 (1990).

> Because petitioners advance a construction of Title VII that would extend its extraterritorial reach only to U.S. nationals, it is the weak presumption of *Foley Brothers*, not the strict clear-statement rule of *Benz* and *McCulloch*, that should govern our inquiry here. Under *Foley Brothers*, a court is not free to invoke the presumption against extraterritoriality until it has exhausted all available indicia of Congress' intent on this subject. Once these indicia are consulted and given effect in this case, I believe there can be no question that Congress intended Title VII to protect U.S. citizens from discrimination by U.S. employers abroad.

In *Environmental Defense Fund v. Massey*, 986 F. 2d 528, 531 (D.C. Cir. 1993), the D.C. Circuit echoed Justice Marshall's sentiments, holding that the presumption against the extraterritorial application of a U.S. statute does not ordinarily apply where "the failure to extend the scope of the statute to a foreign setting will result in adverse effects within the United States," or where "the conduct regulated by the government occurs within the United States."

The 1991 Civil Rights Amendment was not restrictive, but was incredibly expansive. The plaintiffs in *Aramco* were not recruited, hired, trained, supervised, paid or evaluated for raises or promotions in the U.S. – nor is there any indication that they maintained U.S. residences, paid U.S. taxes while they were employed, or that they ever intended to return to the U.S.; yet Congresss specifically passed the 1991 Amendment to ensure that persons like the Aramco plaintiffs would be protected by Title VII abroad.

Congress included any American citizen abroad, without qualifying language connecting the employment to any transaction taking place in the U.S. The authority for the inclusion was strictly one of nationality. The 1991 Amendment does not just protect U.S. citizens sent abroad by

U.S. companies to work -- it protects any person who is a U.S. citizen, whether by birth, naturalization, *or even by the citizenship of a parent.* It protects persons who are technically U.S. "citizens," even if they have never set foot in the United States. Title VII even protects persons with dual citizenship, living abroad, if one of the countries of citizenship is the U.S.

If, for example, an accountant was born and raised in Afghanistan, speaks only Persian, and has never been to the U.S., but is a U.S. citizen because her father was an American, she is covered by Title VII if she works for a U.S. employer in Afghanistan – even though her co-workers, Afghan citizens, are not covered.

By enacting legislation protecting a person so tenuously affiliated with the United States, Congress has sent the message "We are covering these people because *we can.*" To clarify its intentions, Congress expressly excluded aliens – non-U.S. nationals – over whom it had no basis to assert jurisdiction. There is no basis for asserting that Congress ever intended to exclude a legal permanent, taxpaying U.S. resident awaiting citizenship, recruited, hired and trained in the U.S., for a position with a U.S. company fulfilling a U.S. government contract. As a taxpaying, permanent legal resident of the U.S., recruited, hired and trained in the U.S., who planned to return to his wife and his home in the U.S., Mr. Shekoyan is far more connected to the U.S. than many people that Congress explicitly covered in the 1991 Act.

This Court has mandated that Civil rights laws be construed liberally to include, rather than to exclude, persons from coverage to achieve the goal of equal opportunity. *McKennon v. Nashville Banner Publishing Co.*, 115 S. Ct. 879, 885 (1995); *Hackett v. McGuire Bros., Inc.*, 445 F.2d 442 (3d Cir. 1971). Title VII should be applied to serve its inclusive purpose, rather than as a rigid application of words without proper context. "[A] thing may be within the letter

of the statute, and yet not within the statute, because not within its spirit...." *United Steelworkers of America v. Weber*, 443 U.S. 193, 201 (1979); *Holy Trinity Church v. U.S.*, 143 U.S. 457, 459 (1892).

Understanding the vast coverage afforded persons abroad granted by the 1991 Amendment, as well as this Court's mandate to expansively interpret Title VII, the logical conclusion is that Congress expanded Title VII to cover any person within its jurisdiction, based on nationality jurisdiction, where such coverage does not create a conflict of international law.

D. Title VII Should Apply Extraterritorially where there is no Conflict of International Law

On June 3, 2005, the D.C. Circuit decided *Shekoyan*. Only three days later, this Court decided *Spector v. Norweigian Cruise Line Ltd.*, 125 S. Ct. 2169. *Spector* addressed issues involving the extraterritorial application of a U.S. civil rights statute, the ADA, where U.S. citizens and/or U.S. legal permanent residents were affected by the statute's enforcement.

The D.C. Circuit's decision is inconsistent with *Spector*. The court applied a presumption against the extra-territorial application of a U.S. statute and denied Mr. Shekoyan protection against employment discrimination. The D.C. Circuit held that the presumption against extra-territoriality may only be overcome where Congress has issued a "clear statement" that the statute is intended to be applied extra-territorially; however, in *Spector*, this Court expressly rejected this argument to apply the Americans with Disabilities Act (ADA) extra-territorially to foreign flag ships temporarily docked in U.S. ports.

Mr. Shekoyan similarly asks this Court to apply a U.S. civil rights statute extra-territorially, namely, Title VII, due to its effects on him, as a taxpaying, legal resident of the U.S.

The U.S. has every reason to provide Mr. Shekoyan with a legal remedy for discriminatory treatment and no reason to withhold it.

> It suffices to observe that the guiding principles in determining whether the clear statement rule is triggered are the desire for international comity and the presumed lack of interest by the territorial sovereign in matters that bear no substantial relation to the peace and tranquility of the port.

Spector, 125 S. Ct. at 2179.

Justices Ginsburg and Breyer echoed this sentiment in their concurring opinion, stating that the "clear statement rule" is not absolute.

> That rule, as I understand it, derives from and is moored to, the broader guide that statutes should not be interpreted to regulate foreign persons or conduct if that regulation would conflict with principles of international law.

125 S. Ct. at 2184, citing *McCulloch v. Sociedad Nacional de Marineros de Honduras*, 372 U.S. 10, 20 (1963) ("an act of Congress ought never to be construed to violate the law of nations if any other possible construction remains").

> the clear statement rule is an interpretive principle counseling against construction of a statute in a manner productive of international discord. When international relations are not at risk, and there is good reason to apply our own law, asserted internal affairs of a ship should hold no greater sway than a landlocked enterprise.
>
> 125 S. Ct. at 2185 (Ginsburg, concurring)

This Court did not specifically address the application of Title VII extraterritorially; however, Justice Scalia did refer to *Aramco* and the 1991 Civil Rights Act, amending Title VII. Notably, Justice Scalia interpreted Congress' 1991 Amendment to Title VII to extend Title VII jurisdiction extraterritorially, except where it would conflict with the law of the host country:

> After this Court concluded, in *EEOC* v. *Arabian American Oil Co.*, 499 U.S. 244, 260, 113 L. Ed. 2d 274, 111 S. Ct. 1227 (1991), *(Aramco),* that Title VII of the Civil Rights Act of 1964, does not protect American citizens working for American employers in foreign countries, Congress amended Title VII. Unlike what would have been this Court's only available resolution of the issue had it come to the opposite conclusion in *ARAMCO* -- that Title VII applies to all American employers operating abroad -- **Congress was able to craft a more nuanced solution by exempting employers if compliance with Title VII would run afoul of the law in the country where the workplace was located. See 42 U.S.C. § 2000e-1(b); cf. § 12112(c)(1) (same disposition for Title I of the ADA).**

125 S. Ct. at 2194 (Scalia, dissenting) (Emphasis added)

In *Shekoyan*, applying Title VII will surely not provoke international discord, nor would it "run afoul of the law in the country where the workplace was located." To the contrary, all of Sibley's employees, including Mr. Shekoyan, were granted diplomatic immunity by the host country. Mr. Shekoyan could not have sued Sibley in the Republic of Georgia even he had sought to do so; therefore, there could be no possible conflict of U.S. and Georgian law regarding Mr. Shekoyans employment. It is not in the interests of either country to leave the employment relationship

completely unregulated. A "lawless" state of employment serves no legitimate interests.

E. U.S. Law may be Applied where the U.S. has Valid Interests Abroad

Spector held that the presumption against extra-territoriality should not be applied where the U.S. has a valid interest in applying the statute and applying the statute does not violate international law or the law of the sovereign nation. 125 S. Ct. 2169. This Court held a foreign cruise ship subject to Title III of the ADA, regulating public accommodations. *Id.* U.S. law applies to these ships because of their extensive associations with the U.S. and its residents. The U.S. therefore had a valid interest in applying its law to provide reasonable accommodations for U.S. *residents* (not limited to U.S. "*citizens*") with disabilities.

> Most of the passengers on these cruises are United States *residents*; under the terms and conditions of the tickets, disputes between passengers and NCL are to be governed by United States law; and NCL relies upon *extensive advertising in the United States* to promote its cruises and increase its revenues. Despite the fact that the cruises are *operated by a company based in the United States*, serve predominately United States residents, and *are in most other respects United States-centered ventures*, almost all of NCL's cruise ships are registered in other countries, flying so-called flags of convenience.
>
> 125 S. Ct. at 2175 (Emphasis added).

The criteria enumerated by this Court in *Spector* should similarly apply to the Shekoyan-Sibley employment relationship. At least one federal court has adopted similar criteria to apply Title VII to legal permanent residents of the U.S. sent abroad by their U.S. employers, *Torrico v. IBM*, 2004 U.S. Dist. LEXIS 3691 (S.D.N.Y. 2004) and 213 F.

Supp. 2d 390 (S.D.N.Y. 2002). Both courts applied what is essentially an "effects test" analysis.

The D.C. Circuit conspicuously ignored *Torrico*, although it was the main case relied upon, and repeatedly discussed in Mr. Shekoyan Brief, Reply Brief and oral argument. Instead, the Appellate court relied upon *Hu v. Skadden*, 76 F. Supp. 2d 476 (S.D.N.Y. 1999), an earlier case decided by the same court, ignoring *Torrico*'s express rejection of the "oversimplified" *Hu* analysis. *Torrico*, 213 F. Supp. 2d at 405.

Torrico held that the "center of gravity" of the employment relationship was based on the following factors: 1) IBM informed INS that Torrico was temporarily assigned to Chile and would return to the U.S. when his assignment in Chile ended; 2) IBM continued to treat Torrico as a U.S. employee during the term of his assignment in Chile, rather than as an employee of a foreign affiliate; 3) "the expatriate and the U.S. corporation view the expatriate as an employee of the U.S. corporation, and because the expatriate is expected to return to the U.S. while continuing in the employ of the U.S. corporation, the nexus between the employee and the corporation is close;" 4) the employment contract was negotiated in the U.S.; 5) the employment contract was executed in the U.S.; 6) Torrico continued to be paid by IBM US in New York while stationed abroad; and 7) Torrico's activities, functions and reporting duties continued to be controlled by IBM US in New York. 213 F. Supp. 2d at at 404-405.

The connections between Mr. Shekoyan, Sibley and the United States far exceed those of the Torrico-IBM relationship. Sibley was a U.S. government contractor, fulfilling a U.S. mission abroad. Mr. Shekoyan served in Georgia, as a U.S. diplomat, on a *per diem* basis, with a permanent residence in Washington, D.C., with his wife. Mr. Shekoyan's paychecks were both administered by Sibley and

received by Mr. Shekoyan, in D.C. Mr. Shekoyan paid U.S. taxes, D.C. taxes and D.C. unemployment insurance for his entire employment with Sibley. He was clearly employed by the U.S. Sibley corporation, as there was no foreign affiliate. The facts overwhelmingly demonstrate that the "center of gravity" of the employment relationship was the U.S.

1. The U.S. has a Valid Interest in Protecting its Residents from Discrimination

Mr. Shekoyan was a U.S. and D.C. taxpaying legal permanent resident when he was recruited, hired and trained by Sibley and throughout his Sibley employment. When Sibley sent him to work abroad, on a *per diem* basis, he maintained his home and wife in the U.S. After Sibley fired him, Mr. Shekoyan returned to his D.C. home. The U.S. has suffered economic loss, due to Sibley's discrimination against Mr. Shekoyan, both in terms of lose tax revenue from his employment and in unemployment compensation and other benefits that it has provided to Mr. Shekoyan and his family to compensate for his lost income.

In light of the economic and other interests of the U.S. in keeping its residents employed, there is substantial reason for protecting U.S. residents from employment discrimination. The appellate court's decision in *Shekoyan* permits U.S. companies to recruit, hire, train and contract with taxpaying, legal U.S. residents to work abroad, then terminate them without the protection of U.S. anti-discrimination laws. Certainly, there is no valid policy, economic or other reason for allowing U.S. companies to commit such conduct.

2. The U.S. has a Valid Interest in Regulating Employment Negotiated in the United States

The Appellate court completely overlooked Mr. Shekoyan's argument that he is entitled to Title VII coverage, based on basic contract law. In its Brief, Sibley specifically

acknowledged that D.C. law controls the employment contract between Shekoyan and Sibley, as well as Mr. Shekoyan's tort claims. Sibley's contracts with employees and contractors hired after Mr. Shekoyan demonstrate Sibley's own desire that Washington, D.C. law govern its contracts with employees abroad.

Even absent a contract specifying the controlling law, disputes and injuries arising from employment are controlled by U.S. law where the employment contract was negotiated in the U.S., even if the injury occurred abroad. *Neely v. Club Med Sales, Inc.*, D.C. Civ. No. 91-cv-07416. Sibley should not escape the laws of the U.S. with respect to its employment contract with Mr. Shekoyan, also executed in Washington, D.C. Sibley should not invoke and discard U.S. law as it pleases, with impunity. Even more than the cruise line in *Spector*, Sibley was a U.S. venture, made by a U.S. corporation, working for the U.S. government and employing U.S. legal permanent residents.

3. **Executive Order 11246 Reflects U.S. Interests in Fulfilling its Missions Abroad**

The U.S. government has a substantial vested interest in protecting legal permanent residents from discrimination while they fulfill U.S. government missions abroad. Sibley's corporate income was derived almost entirely, if not entirely, from the U. S. government, fulfilling U.S. missions abroad. Sibley relied on extensive advertising in the U.S. and recruited Mr. Shekoyan through this advertising. Moreover, Sibley solicited *all* of its business from the United States government. This bidding occurred exclusively in the Unites States. Executive Order 11246 prohibits discrimination against persons like Mr. Shekoyan, although he is not a U.S. citizen.

> Contractors shall not discriminate on the basis of race, color, religion, sex, or national origin *when hiring or making employee assignments for work—to be*

performed in the United States or abroad. Contractors are exempted from this obligation only when hiring persons outside the United States for work to be performed outside the U.S. (see 41 CFR 60-1.5(a)(3)). Therefore, a contractor hiring workers in the United States for either Federal of non-federally connected work shall be in violation of Executive Order 11246, as amended, by refusing to employee or assign any person because of race, color, religion, sex, or national origin, *regardless of the policies of the country where the work is to be performed or for whom the work will be performed.*

41 CFR § 1.10 (Emphasis added)

Work outside the United States. Contracts and subcontracts are exempt from the requirements of the equal opportunity clause with regard to work performed outside the United States by employees *who were not recruited within the United States.*
41 CFR § 1.5(a)(3) (Emphasis added)

Sibley contracted with USAID, an Agency within the U.S. Department of State, to provide services in the Republic of Georgia. Sibley recruited, hired and trained Mr. Shekoyan, in the U.S., to fulfill that contract. Mr. Shekoyan's employment falls squarely within the protection of Executive Order 11246. See also EEOC Decision 90-1, CCH EPG ¶ 6875, *Title VII Covers Military Contractor's Employment of Americans Overseas* (Title VII applied to U.S. government contractor employing U.S. citizens abroad) Executive Order 11246 protects Mr. Shekoyan from discrimination, although he is not a U.S. citizen.[5]

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[5] The court held that there was no private right of action *under Executive Order 11246* [217 F. Supp. 2d at 69-70]; however, the *Complaint* and *Plaintiff's Opposition to Defendant's Motion to Dismiss* make clear that Mr. Shekoyan never argued such a right. He asserts a breach of contract claim that includes Defendant's violation of

Where statutes can be reconciled, principles of statutory construction favor a consistent, rather than conflicting, interpretation. Since the prohibitions against discrimination in Executive Order 11246 are identical to the prohibitions in Title VII, Executive Order 11246 should be considered in determining whether the U.S. government has a valid interest in prohibiting employment discrimination by a U.S. company implementing a U.S. contract abroad.

The U.S. government contractor fulfilling a government mission abroad typically targets persons familiar with the language and culture of the host country to perform the required duties. This pool of candidates will disproportionately include recent immigrants from, or neighboring, the host country. If potential employees realize that they will not be protected against employment discrimination– including discrimination on the bases of race, national origin, religion, age, disability, sex, including sexual harassment[6] -- they will be reluctant to accept these assignments.[7] The government's mission may therefore be thwarted due to the contractor's inability to attract the most qualified people to implement the mission.[8]

Executive Order 11246. Mr. Shekoyan's contract specifically incorporated all of the federal regulations, policies and procedures applicable to its contract with USAID on the GEAR Project (Facts ¶ 13). A violation of one of the applicable regulations, policies or procedures applicable to the USAID contract, violated his contract.

[6] A female employee could even be raped by a supervisor or co-worker, thenfired in retaliation for pressing criminal charges against the perpetrator, with no remedy against her U.S. employer.

[7] Michelle Shender, *Casenote: Claims by Non-Citizens under the Americans with Disabilities Act: Proper Extraterritorial Application in Torrico v. International Business Machines?* 17 Pace Int.'l L. Rev 131, 132 (Spring 2005).

[8] Conversely, U.S. corporations may discriminate against U.S. citizens, in favor of legal residents awaiting citizenship, preferring employees who are not protected by U.S. equal employment laws.

4. The U.S. has a Valid National Security Interest in Regulating the Employment Practices of U.S. Government Contractors Abroad

Where a U.S. national, sent abroad by an American employer, has been discriminated against by that employer, and left with no remedy at law, the disgruntled employee may, out of frustration and desperation, elect to exercise self-help against the American employer. Particularly in times of unstable international relationships, such self-help could even cause an international incident. Since the U.S. government, including the military, is increasingly contracting traditional government jobs to the private sector, including positions abroad, these employees may well be privy to information traditionally only available to U.S. government employees. The abandoned employee, deprived of his/her livelihood, could be tempted to become the source of a security breach. This is a particular risk where employees are left stranded in a foreign country, with no economic resources to return to their homes in the U.S.

III. A "Whistleblower," is Protected under the FCA if s/he Reports Suspected Fraud against the Government Internally, rather than to the Government

To sustain an action under the False Claims Act ("Whistleblower Act"), 31 U.S.C.S. § 3730(h), plaintiff must prove that: 1) s/he engaged in conduct protected under the statute, 2) the employer was aware of his/her conduct, and 3) that s/he was terminated in retaliation for his/her conduct. *Yesudian v. Howard Univ.*, 153 F.3d at 736. *Yesudian* held that the FCA, § 3730(h), protects an employee who reports suspected government fraud to his/her supervisor to uncover and prevent the continued fraud. *Yesudian* is consistent with the law in the Third, Fifth, Sixth, Seventh and Eleventh Circuits.

> It would make little sense to protect an anonymous *qui tam* plaintiff who filed an expensive and time-consuming lawsuit while ignoring someone like the Plaintiff, whose bold conduct led to a quick, voluntary and efficient disclosure of the fraud and reparation to the government. Thus, we hold that the whistleblower protection provision of the False Claims Act forbids discrimination against an employee who has made an intra-corporate complaint about fraud against the government.
>
> ...
>
> The purpose of the False Claims Act, of course, is to discourage fraud against the government, and the whistleblower provision is intended to encourage those with knowledge of fraud to come forward.

Robertson v. Bell Helicopter Textron, 32 F.3d 948, 951 (5th Cir. 1994). Accord, *Hutchins v. Wilentz*, 253 F.3d 176 (3rd Cir. 2001); M*cKenzie* v. *BellSouth Telecomms., Inc.*, 219 F.3d 508, 515 (6th Cir. 2000); C*hildree v. UAP/GA Chem, Inc.*, 92 F.3d 1140, 1146 (11th Cir. 1996), cert. denied, 519 U.S. 1148 (1997); *Mikes v. Strauss*, 889 F. Supp. 746 (SDNY 1995); N*eal v. Honeywell, Inc.*, 33 F.3d 860 (7th Cir. 1994).

In its August 19, 2002 decision, the district court followed this Court's criteria in *Yesudian*. 217 F. Supp. 2d at 73; however, it reversed its own reasoning in its March 19, 2004 decision. The district court adopted criteria from the Fourth Circuit's decision in *Zahodnick v. International Business Machines Corp.*, 135 F.3d 911 (4th Cir. 1997). *Zaholdnick* characterized an employee's internal corporate complaints as mere "suggestions" for compliance with government requirements, as opposed to protected allegations of corruption or fraud. The district court then ignored undisputed facts of record to fit the facts of *Shekoyan* into this new legal framework:

> all of the plaintiff's complaints to his supervisors constituted suggestions designed to improve or benefit Sibley.[9] Even in his amended complaint, the plaintiff states that he "was a dedicated employee of Sibley International who wanted to cure the defects in the company caused by malfeasors, but not to destroy the company."
>
> *Shekoyan v. Sibley*, 309 F. Supp. at 20.

The court suggests that Mr. Shekoyan was required to make complaints directly to the government, designed to "destroy the company" in order to be protected as a "whistleblower." This requirement will have a chilling effect on reports of private abuse of U.S. taxpayer dollars. If an employee risks termination, and cannot claim protection as a "whistleblower" unless he/she can *definitively prove* misuse of government funds and report it to a government agency, few, if any, employees would be willing to take that risk. The losers will clearly be the American taxpayer, the integrity of government contracts, and the conscience of any employee who witnesses private abuse of U.S. government funds and feels compelled to keep quiet rather than to file a complaint with a government agency, designed to "destroy the company."

IV. Summary Judgment was Improperly Granted Since Material Facts were in Dispute

Fed. R. Civ. P. 12(b)(6), state that a party is only entitled to dismissal of a claim if, assuming all facts in the most favorable light to the non-moving party, the moving party is entitled to a judgment as a matter of law. *Conley v. Gibson*, 355 U.S. 41, 45-46 (1957); *Trans-America Leasing, Inc. v. La Republica de Venezuela*, 200 F.3d 843, 847 (D.C. Cir. 2000); *Kowal v. MCI communications Corp.*, 16 F.3d 1271

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[9] The district court ignored the purpose of the FCA, which is to benefit U.S. taxpayers by stopping the fraud and misuse of government funds.

(D.C. Cir. 1994). Fed. R. Civ. P. 56(c), requires that, for purposes of motions for summary judgment, "the evidence of the non-movant is to be believed and all justifiable inferences drawn in his favor." *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 250 (1986).

A. The Center of Gravity of the Shekoyan-Sibley Employment Relationship was in the U.S.

The district court usurped the province of the jury and completely ignored the undisputed evidence that established the extensive U.S. contacts and interests involved in the Shekoyan-Sibley employment relationship that would have demonstrated that the gravity of the employment relationship was in the U.S. The Court of Appeals accepted, as fact, the district court's conclusions, ignoring Mr. Shekoyan's references to the evidence of record.

B. Mr. Shekoyan did Believe that there was Corruption at Sibley

The district court again usurped the province of the jury and concluded, contrary to the evidence, that Mr. Shekoyan did not believe that Sibley officials were misappropriating government funds. The district court *ignored* internal Sibley memoranda from Mr. Shekoyan to Sibley's Vice President, Gary Vanderhoof, stating his belief that Sibley employees and contractors were misappropriating U.S. government funds, including "inappropriate transactions" and "violations" of U.S. government regulations on the GEAR Project. Instead of relying, at least in part, on these memoranda, setting forth Mr. Shekoyan's specific observations of misuse of government funds by Sibley employees and contractors, the court made an erroneous factual finding, based solely on a short excerpt from Mr. Shekoyan's deposition, taken out of context, under cross-examination, where English is his second language. The district court violated its obligation to presume facts in favor of the non-moving party and to leave factual disputes to a jury.

V. The Appellate Court was Required to Examine the Material Facts to Determine whether the District Court Exercised an Abuse of Discretion

A. Shekoyan's *Motion to Late File a Motion for Summary Judgment*

Atchinson v. District of Columbia, 73 F.3d 418, 424 (D.C. Cir. 1996) requires an appellate court to review a decision of the district court regarding modifications of the Court's schedule based upon whether the trial court abused its discretion. A party may amend pleadings, based on newly discovered evidence. Fed. R. Civ. P. 15. The district court is required to exercise discretion as to whether to allow a party to file out of time, taking into account the needs and due diligence of the parties, the practicalities of obtaining certain evidence, the harm, surprise or unfairness to either party, and in the interests of justice. *Canady v. Erbe Elektromedizin GmbH*, 307 F. Supp. 2d 2 (D.D.C. 2004). The appellate court held that the district court was justified in denying Shekoyan's motion for an enlargement of time to file a *Motion for Summary Judgment* because:

> Shekoyan had **earlier** filed a motion to supplement his opposition to Sibley's motion for summary judgment with the newly obtained declaration, which allowed the district court to consider whether the material in evaluating whether summary judgment was warranted.

409 F.3d at 424-425. (Emphasis added)

The appellate court implied that Mr. Shekoyan actually had Mr. Adamia's declaration and waited an unspecified, but lengthy period time before he sought to file his dispositive motion based on the declaration; however, the record clearly demonstrates that Mr. Shekoyan had only filed his *Motion to Supplement* only *three days* "*earlier*," on January 27, 2004. During those three short days, Mr. Shekoyan's counsel diligently drafted Mr. Shekoyan's detailed *Motion for*

Summary Judgment, with references to voluminous exhibits filed in *Opposition to Sibley's Motion for Summary Judgment*, compelling judgment for Mr. Shekoyan. There was no delay. In addition, the appellate court ignored the fact that the district court *never* even decided Mr. Shekoyan's *Motion to Supplement his Opposition* with Mr. Adamia's declaration.

Mr. Shekoyan moved the district court to supplement his *Opposition to Sibley's Motion for Summary Judgment* with the Adamia declaration less than a month after it was signed, in Moscow, and only days after Mr. Shekoyan's counsel received it. During the discovery period, Mr. Shekoyan had listed Mr. Adamia as a potential witness. He had exhausted all means available to him to locate Mr. Adamia and other former co-workers from Georgia. Once Mr. Adamia was located, the "interests of justice" and uncovering the truth compelled permitting the late filing. When Mr. Shekoyan filed his motion, Sibley's dispositive motion had been pending for *nine months*. There was no trial date, so the Court's schedule would not have been altered. The district court abused its discretion by denying Mr. Shekoyan's motion.

B. **Shekoyan's *Motion for Rule 11 Sanctions***

A court of appeals is required to consider evidence and make determinations of fact based upon whether the district court abused its discretion;[10] yet the appellate court in *Shekoyan* flatly refused to "second guess" the district court [409 F.3d at 425]. The appellate court not only failed to examine the evidence offered by Mr. Shekoyan to prove the egregious misconduct by Sibley's attorneys, but it completely ignored Mr. Shekoyan's description of the evidence and, instead, adopted, without the independent review, the district court's "factual" determinations. The appellate court's

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[10] *Cooter & Gell v. Hartmax Corp.*, 496 U.S. 384, 401 (1990).

decision therefore incorrectly presents the facts forming the basis of Mr. Shekoyan's *Motion for Rule 11 Sanctions*.

Both the district court and the Court of Appeals *refused to listen* to approximately fifteen minutes worth of an audiotape and *ignored* the 37 page transcript of the audiotape. This evidence conclusively established that Sibley's attorneys relied on perjured testimony to falsely accuse Mr. Shekoyan and his attorney of submitting false sworn statements to the Court. The evidence pushed aside, without review, compels sanctions against Sibley's attorneys, under Rule 11, for egregious misconduct, including securing and relying upon perjured testimony. Mr. Shekoyan implores this Court not to turn a blind eye to such serious misconduct in federal court. The appellate court's failure to actually review the evidence of record effectively nullified Mr. Shekoyan's appeal rights.

CONCLUSION

Mr. Shekoyan respectfully requests that this Court grant *certiorari* to resolve the conflicts of law between the Circuits and to decide issues of national importance.

Respectfully submitted,

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APPENDIX

Statutes

Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e-2(a), provides:

It shall be an unlawful employment practice for an employer…

(1) to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms and conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin.

Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e-3(a), provides:

It shall be an unlawful employment practice for an employer …

to discriminate against any of his employees or applicants for employment …because he has opposed any practice made an unlawful employment practice by this title, or because he has made a charge, testified, assisted, or participated in any manner in an investigation, proceeding, or hearing under this title.

VLADIMIR SHEKOYAN, APPELLANT v. SIBLEY INTERNATIONAL, APPELLEE

No. 04-7040

UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

409 F.3d 414; 2005 U.S. App. LEXIS 10174; 95 Fair Empl. Prac. Cas. (BNA) 1562

March 15, 2005, Argued June 3, 2005, Decided

SUBSEQUENT HISTORY: Rehearing denied by Shekoyan v. Sibley Int'l, 2005 U.S. App. LEXIS 19630 (D.C. Cir., Sept. 9, 2005)
Rehearing denied by, En banc Shekoyan v. Sibley Int'l, 2005 U.S. App. LEXIS 19637 (D.C. Cir., Sept. 9, 2005)
Motion granted by Shekoyan v. Sibley Int'l, 2005 U.S. App. LEXIS 19640 (D.C. Cir., Sept. 9, 2005)
PRIOR HISTORY: [**1] Appeal from the United States District Court for the District of Columbia. (No. 00cv02519).
Shekoyan v. Sibley int'l Corp., 309 F. Supp. 2d 9, 2004 U.S. Dist. LEXIS 4845 (D.D.C., 2004)

DISPOSITION: Affirmed.

CASE SUMMARY

COUNSEL: Dawn V. Martin argued the cause for the appellant.

Kathy M. Banke argued the cause for the appellee. Laura J. Oberbroeckling was on brief.

JUDGES: Before: SENTELLE, HENDERSON and ROGERS, Circuit Judges.

Opinion filed for the court by Circuit Judge HENDERSON.
OPINIONBY: KAREN LECRAFT HENDERSON

OPINION: [*416] KAREN LECRAFT HENDERSON, *Circuit Judge*: Vladimir Shekoyan, a lawful permanent resident of the United States during all times relevant to this case, filed a suit against his former employer, Sibley International, alleging employment discrimination under Title VII of the Civil Rights Act of 1984 (Title VII), 42 U.S.C. §§ 2000e *et seq.*, and retaliation under the False Claims Act (FCA), 31 U.S.C. §§ 3729-3733. Shekoyan also asserted state tort [*417] and breach of contract claims whose merits are not before us. The district court dismissed Shekoyan's Title VII claim for lack of subject matter jurisdiction, *Shekoyan v. Sibley Int'l Corp.*, 217 F. Supp. 2d 59 (D.D.C. 2002). The court subsequently granted summary judgment in favor [**2] of Sibley on the FCA claim while dismissing Shekoyan's pendent state law claims for lack of supplemental jurisdiction. *Shekoyan v. Sibley Int'l Corp.*, 309 F. Supp. 2d 9 (D.D.C. 2004). Shekoyan appeals these rulings, as well as two unpublished orders issued by the district court related to Shekoyan's attempt to submit non-standard affidavits in opposition to Sibley's motion for summary judgment. Because the district court correctly interpreted Title VII not to apply to an alien employed outside the United States and properly applied the summary judgment standard in finding for Sibley on Shekoyan's FCA claim, we affirm the judgment of the district court.

I.

Vladimir Shekoyan immigrated to the United States from his native Armenia in 1994 and was granted "lawful permanent resident" (LPR) status in 1996.[1] Shekoyan has a Ph. D. in

[1] The Immigration and Nationality Act (INA) imposes a five-year waiting period after acquiring LPR status before an alien may apply for U.S. citizenship. 8 U.S.C. § 1427(a). Shekoyan applied for citizenship in 2001 and became a naturalized American citizen in January 2003.

Finance and Economics from the University of Moscow and has worked for Armenia's Ministry of Economics as well as for the World Bank. Sibley International is a consulting firm headquartered in Washington, D.C. that "assists foreign governments in implementing accounting reform." Def.'s Statement of Material Facts Not in Dispute, Case No. 00-2519 (Apr. 28, 2003). **[**3]**

This lawsuit stems from Shekoyan's employment with Sibley from January 1998 until October 1999. Shekoyan was hired as a "Training Advisor" on the Georgia Enterprise Accounting Reform (GEAR) project for which Sibley had been awarded a contract (called a "task order") by the U.S. Agency for International Development (USAID). The parties signed an employment letter contract that spelled out a 21-month term of employment with the "hope that this will be the beginning of a longer association."[2] The contract stated Shekoyan's place of employment as "Tbilisi, Republic of Georgia," and noted his eligibility for "USAID benefits for long-term personnel living in Georgia." Shekoyan claims that Sibley "committed to maintaining **[**4]** its employment relationship with [him] beyond the 21-month contract" and that he was to "be employed by Sibley back in Washington, D.C." This claim is disputed by Donna Sibley, the president of Sibley International, who stated in her deposition that Shekoyan's employment beyond the GEAR project was never discussed in more definite terms than the "hope" expressed in the employment contract.

The hoped-for ongoing relationship never came about. Despite a second USAID task order for Sibley to continue the GEAR project, Shekoyan was terminated as of October 31, 1999--the end date of the original task order. The letter

[2]The copy of the letter contract dated January 15, 1998 contained in the Exhibits to the Joint Appendix is not signed by Shekoyan but the parties do not dispute that the text of the letter constitutes a valid employment contract.

of termination, dated October 20, 1999 and sent to Shekoyan's Washington, D.C. residence, cites "a change in staffing requirements" as the reason Shekoyan was not rehired. **[**5]** **[*418]** According to Sibley's brief, the available positions under the new task order required a degree in public accounting, which Shekoyan did not have.

Shekoyan tells a different story. He claims that his working relationship with his immediate supervisor Jack Reynolds deteriorated as a result of Reynolds's discrimination based on Shekoyan's national origin. Shekoyan claims that Reynolds made statements that Shekoyan was not a "real American," mocked his accented English and made racist comments about people from former Soviet states. Shekoyan also alleges financial misconduct by Sibley staff on the GEAR project, including use of the offices and equipment paid for by USAID to run a private audit practice, payment of full time salaries to individuals who were employed full time by other organizations, use of resources supplied by USAID to develop unrelated business for Sibley and diversion of project vehicles and staff members by Jack Reynolds and his wife for personal tasks. Shekoyan claims to have alerted his superiors at Sibley in Washington regarding Reynolds's harassment and misuse of project resources--a claim Sibley denies--and that, as a result, he was fired for insubordination **[**6]** rather than because of any change in staffing requirements.

Shekoyan filed a lawsuit in federal district court on October 20, 2000 alleging: discrimination on the basis of national origin, a violation of Title VII, 42 U.S.C. §§ 2000e *et seq.*, and the District of Columbia Human Rights Act (DCHRA), D.C. Code § 2-1402.11; retaliation for his investigation into the misuse of federal funds by GEAR employees in violation of the FCA, 31 U.S.C. §§ 3729-3733; and other state law torts and breaches of contract. Sibley moved to dismiss Shekoyan's Title VII claim under FED. R. CIV. P. 12(b)(1)

on the ground that Title VII protections do not extend to non-U.S. citizens working abroad and to dismiss his FCA claim under FED. R. CIV. P. 12(b)(6) for failure to allege facts sufficient to make out a whistleblower claim. Sibley also moved to dismiss the pendent state law claims for lack of supplemental jurisdiction. The district court granted Sibley's motion to dismiss the Title VII claim, finding that because "the plaintiff is a permanent resident **[**7]** alien, who was employed extraterritorially, he is outside the scope of the protections of Title VII." *Shekoyan v. Sibley Int'l Corp.*, 217 F. Supp. 2d 59, 68 (D.D.C. 2002) (*Shekoyan I*). Accordingly, the district court held that it lacked subject matter jurisdiction over the Title VII claim. *Id.* Turning to Shekoyan's FCA claim, the district court found that the complaint, which had been filed *pro se*, failed to satisfy FED. R. CIV. P. 9(b), which requires that "in all averments of fraud or mistake, the circumstances constituting fraud or mistake shall be stated with particularity." *Shekoyan I*, 217 F. Supp. 2d at 73. Nevertheless, the district court granted Shekoyan leave to amend his complaint because "'leave to amend is "almost always" allowed to cure deficiencies in pleading fraud.'" *Id.* at 74 (quoting *Firestone v. Firestone*, 316 U.S. App. D.C. 152, 76 F.3d 1205, 1209 (D.C. Cir. 1996) (in turn quoting *Luce v. Edelstein*, 802 F.2d 49, 56 (2d Cir. 1988))). Moreover, in Shekoyan's opposition to Sibley's motion to dismiss, he set forth 22 instances of fraud, **[**8]** leaving the court unable to "'say with assurance that ... it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief.'" *Shekoyan I*, 217 F. Supp. 2d at 75 (quoting *Haines v. Kerner*, 404 U.S. 519, 520-21, 30 L. Ed. 2d 652, 92 S. Ct. 594 (1972) (internal quotation omitted) (omission in *Shekoyan I*). Because Shekoyan's state law claims derived from the same "common nucleus of operative fact," *United Mine Workers of Am. v.* **[*419]** *Gibbs*, 383 U.S. 715, 725, 16 L. Ed. 2d 218, 86 S. Ct. 1130 (1966), as his FCA claim, the district court chose to exercise supplemental jurisdiction

and denied Sibley's motion to dismiss those claims. *Shekoyan I*, 217 F. Supp. 2d at 75-76.

Shekoyan filed his first amended complaint on September 2, 2002 with the assistance of counsel. Sibley filed an answer denying all wrongdoing and a counterclaim for the value of certain equipment it alleged Shekoyan took from the GEAR project site. Following discovery, on April 28, 2003, Sibley moved for summary judgment on Shekoyan's FCA claim. As part of the filing in opposition, Shekoyan's lawyer signed and submitted an unnotarized **[**9]** "affidavit" that recounts the purported substance of her telephone interviews with former Sibley employees, including Sibley's former Chief Financial Officer, David Bose. Shekoyan's filing also included an unsigned draft declaration by Gary Vanderhoof, a former Vice President and Project Advisor at Sibley, corroborating Shekoyan's version of events on the GEAR project. Sibley challenged the accuracy of the affidavit and draft declaration and moved to strike both. In support, Sibley submitted signed, notarized affidavits by Bose and Vanderhoof stating that Shekoyan's lawyer had misrepresented their conversations and that they could not substantiate any harassment claims. Sibley also pointed to the transcript of the telephone conversation between Shekoyan's lawyer and Bose, which in several places had Bose denying any knowledge of harassment before Shekoyan's return to the United States. Shekoyan countered with a Rule 11 motion for sanctions against Sibley's lawyers. The district court denied Shekoyan's Rule 11 motion and granted Sibley's motion to strike in part, striking from the record the unnotarized affidavit of Shekoyan's lawyer and the unsigned Vanderhoof declaration.

While the **[**10]** dispute over Shekoyan's submissions in opposition to Sibley's motion for summary judgment was playing out, on January 30, 2004, Shekoyan moved to file his own motion for summary judgment out of time. In an

unpublished order dated February 3, 2004, the district court denied the request, noting that all dispositive motions were required--per court order--to be filed by April 28, 2003. On March 19, 2004, the district court granted Sibley's motion for summary judgment and dismissed Shekoyan's remaining state law claims and Sibley's remaining counterclaims. *Shekoyan v. Sibley Int'l Corp.*, 309 F. Supp. 2d 9, 22 (D.D.C. 2004) (*Shekoyan II*). The district court found that Shekoyan failed to raise "a genuine issue as to any material fact," FED. R. CIV. P. 56(c), because he could show neither that he was engaged in "protected activity" nor that he had suffered an adverse employment action as a result thereof. *Shekoyan II*, 309 F. Supp. 2d at 14, 20. Having disposed of the last of Shekoyan's federal claims, the district court declined to exercise jurisdiction over the remaining District of Columbia claims, noting that **[**11]** HN1 28 U.S.C. § 1367(d) provides for the tolling of a state's statute of limitations when a federal court exercises supplemental jurisdiction over state claims and concluding, therefore, that dismissing the claims "will not adversely impact plaintiff's ability to pursue his District of Columbia claims in the local court system." *Shekoyan II*, 309 F. Supp. 2d at 22.

Shekoyan timely filed his notice of appeal on April 6, 2004. Pursuant to the district court's order in *Shekoyan II*, Shekoyan filed his state and common law claims in the District of Columbia Superior Court. *Shekoyan v. Sibley Int'l Corp.*, C.A. No. 04-0002980 (D.C. Sup. Ct. 2004). Those proceedings are stayed pending the outcome of this appeal. **[*420]**

II.

A. *The Title VII Claim*

HN2 Title VII of the Civil Rights Act of 1964 prohibits discrimination in employment based on, *inter alia*, race or national origin. Title VII provides that HN3 "it shall be an unlawful employment practice for an employer ... to fail or

refuse to hire or to discharge any individual, or otherwise to discriminate against any individual ... because of such individual's race, color, religion, sex, or national [**12] origin." 42 U.S.C. § 2000e-2(a). An "employee" is defined by Title VII, in circular fashion, as "an individual employed by an employer." *Id.* § 2000e(f). The parties do not dispute that Shekoyan was "employed" by Sibley International nor do they dispute that Sibley meets the statutory definition of an "employer." *See id.* § 2000e(b).

Shekoyan contends that the district court erred in two ways in dismissing his Title VII claim for lack of subject matter jurisdiction: first, by holding that Title VII does not extend to a non-U.S. citizen employed overseas; and second, by holding that, for Title VII purposes, Shekoyan's place of employment was the Republic of Georgia rather than the United States. *Shekoyan I*, 217 F. Supp. 2d at 67-68. HN4 We review *de novo* a district court's dismissal of a claim under FED. R. CIV. P. 12(b)(1). *Macharia v. United States*, 357 U.S. App. D.C. 223, 334 F.3d 61, 64 (D.C. Cir. 2003).

The United States Supreme Court took up the issue of Title VII's extraterritorial application in *Equal Employment Opportunity Comm'n v. Arabian Am. Oil Co.*, 499 U.S. 244, 113 L. Ed. 2d 274, 111 S. Ct. 1227 (1991) [**13] (*ARAMCO*). In *ARAMCO*, the Court held that the protections of Title VII do not extend to citizens employed by U.S. companies overseas. It relied on the "longstanding principle of American law 'that HN5 legislation of Congress, unless a contrary intent appears, is meant to apply only within the territorial jurisdiction of the United States.'" *Id.* at 248 (quoting *Foley Bros., Inc. v. Filardo*, 336 U.S. 281, 285, 93 L. Ed. 680, 69 S. Ct. 575 (1949)). It explained that HN6 because the Court "assumes that Congress legislates against the backdrop of the presumption against extraterritoriality," it will not read extraterritorial jurisdiction into a statute "unless there is the affirmative intention of the

Congress clearly expressed." *Id.* (internal quotation marks omitted). If the statutory language is "ambiguous" or "does not speak directly to the question presented," the Court will not infer extraterritorial jurisdiction. *Id.* at 250.[3] The Court thus concluded **[*421]** that "Congress' awareness of the need to make a clear statement that a statue applies overseas" combined with its use of "more limited, boilerplate ... language" manifested that the Congress never "intended **[**14]** Title VII to apply abroad." *Id.* at 252, 258-59. **[**15]**

In response to *ARAMCO*, the Congress amended Title VII to extend its protections to U.S. citizens working overseas. The

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[3] Shekoyan argues that the presumption against extraterritoriality should not apply here because "the interests of the U.S. are clearly affected by the assertion of Title VII jurisdiction over Sibley." Pet'r Br. at 22 In support he cites *Envt'l Def. Fund, Inc. v. Massey*, 300 U.S. App. D.C. 65, 986 F.2d 528 (D.C. Cir. 1993), which involved the extraterritorial application of the National Environmental Policy Act, 42 U.S.C. §§ 4321 *et seq.*, to a federal agency, the National Science Foundation for failing to prepare an Environmental Impact Statement (EIS) before incinerating food waste in Antartica. 986 F.2d at 529. In *Massey*, we first noted that the presumption against extraterritoriality "is generally not applied where the failure to extend the scope of the statute to a foreign setting will result in adverse effects within the United States." *Id.* at 531. The court named U.S. antitrust law, 15 U.S.C. §§ 1 *et seq.*, and trademark law, 15 U.S.C. §§ 1051 *et seq.*, as examples of statutes enforced extraterritorially in order to avoid "negative economic consequences" domestically. *Massey*, 986 F.2d at 531. Shekoyan lists lost tax revenues to the federal government as well as the cost of unemployment benefits paid to him as sufficient adverse consequences to negate the presumption of territoriality. But *Massey* was not decided on the "adverse consequences" exception. Rather, the court found that "because the decisionmaking processes of federal agencies take place almost exclusively in this country and involve the workings of the United States government, they are uniquely domestic." *Id.* at 532 (citation omitted). Moreover, the *Massey* court expressly noted that the presumption against extraterritoriality *did* apply to Title VII. *Id.* at 533 (citing *ARAMCO*, 499 U.S. at 255).

statute now reads: HN7"With respect to employment in a foreign country," the term "employee" "includes an individual who is a citizen of the United States," 42 U.S.C. § 2000e-1(a). The Congress also retained HN8section 2000e-1(a), which specifies that Title VII does not apply "to an employer with respect to the employment of aliens outside any State." *Id.* § 2000e-1(a). Shekoyan argues that his LPR status makes him a U.S. national, thereby placing him in statutory limbo between a protected citizen and an excluded alien. Pet'r Br. at 11. Shekoyan relies on the Immigration and Nationality Act, 8 U.S.C. § 1101, which defines "alien" to include "any person not a citizen or national of the United States," *id.* § 1101(a)(3), to support his interpretation that a national should not fall within Title VII's "alien" exclusion for overseas employees. Yet even assuming, *arguendo*, that a lawful permanent resident qualifies as a U.S. national--a matter the parties dispute--Shekoyan faces a significant problem: HN9Title VII **[**16]** does more than merely exclude an alien employed overseas from protection; it affirmatively grants protection only to "a citizen of the United States." 42 U.S.C. § 2000e(f). Especially in light of the presumption against extraterritoriality, the Congress's express language extending the extraterritorial reach of Title VII only to American citizens controls. HN10"'When the statute's language is plain, the sole function of the courts ... is to enforce it according to its terms.'" *United States ex rel. Totten v. Bombardier Corp.*, 363 U.S. App. D.C. 180, 380 F.3d 488, 494 (D.C. Cir. 2004) (quoting *Lamie v. United States Tr.*, 540 U.S. 526, 157 L. Ed. 2d 1024, 124 S. Ct. 1023 (2004) (alteration in *Bombadier*) (omission added)).

HN11The Congress is under no obligation to extend the protection of its laws extraterritorially to every individual to whom it could do so and courts have read Title VII's extraterritorial jurisdiction provision narrowly. *See, e.g.*, *Iwata v. Stryker Corp.*, 59 F. Supp. 2d 600, 603 (N.D. Tex. 1999) (Title VII has "limited extraterritorial reach"); *Russell*

v. Midwest-Werner & Pfleiderer, Inc., 955 F. Supp. 114, 115 (D. Kan. 1997) **[**17]** ("Title VII applies only to American citizens employed abroad...."). Courts have also read similar provisions in analogous statutes narrowly. *See, e.g.*, *Reyes-Gaona v. N.C. Growers Ass'n*, 250 F.3d 861, 865 (4th Cir. 2001) (interpreting Age Discrimination in Employment Act to have "limited extra-territorial application"); *Hu v. Skadden, Arps, Slate, Meagher & Flom LLP*, 76 F. Supp. 2d 476, 477 (S.D.N.Y. 1999) (extraterritorial application of ADEA "clearly limited"); *O'Loughlin v. The Pritchard Corp.*, 972 F. Supp. 1352, 1364 (D. Kan. 1997) (finding that "intent of Congress" was to make "ADEA inapplicable to non-citizens of the United States working abroad"). Moreover, the Congress has explicitly chosen to extend extraterritorial coverage to an LPR in other statutes. *See, e.g.*, Arms Control Export Act, 22 U.S.C. § 2778(b) (coverage includes "every person" who engages in **[*422]** brokering activities with respect to defense articles; limited by International Traffic in Arms Regulation, 22 C.F.R. § 129.3(a), to apply only to a "U.S. person," which includes an LPR. 22 C.F.R. § 120.15 **[**18]**). Accordingly, we hold that [11N12] Title VII does not extend extraterritorially to any person who is not an American citizen.

Shekoyan's alternative argument, that he was not employed "in a foreign country" within the meaning of Title VII, 42 U.S.C. § 2000e(f), is based on the facts that he was hired and trained in the United States, that many decisions related to his employment were made in the United States and that his letter of termination was sent to his Washington, D.C. residence. Because the employment letter contract between Sibley and Shekoyan stated Shekoyan's place of employment as "Tbilisi, Republic of Georgia" and classified him as "long-term personnel living in Georgia" and because Shekoyan resided and worked in Georgia throughout his employment with Sibley, however, we agree with the district court that Shekoyan was engaged in "employment in a

foreign country."

B. *The FCA Claim*

HN13 The False Claims Act, 31 U.S.C. §§ 3729-3733, imposes a civil penalty and treble damages on any individual who, *inter alia*, "knowingly presents, or causes to be presented, to an officer or employee of the United States Government ... a false **[**19]** or fraudulent claim for payment or approval." *Id.* § 3729(a). HN14 The FCA permits a private party--a "relator"--to initiate a *qui tam* action on behalf of the government. *Id.* § 3730(b). The government has the option of taking over the suit or leaving it to the relator to prosecute. *Id.* In either case, the relator is entitled to a percentage of any recovery resulting from a successful suit. *Id.* § 3730(d)(1)-(2).

HN15 The FCA also contains a "whistleblower" protection provision which can give rise to a retaliation claim. The statute provides that:

> any employee who is discharged, demoted, suspended, threatened, harassed, or in any other manner discriminated against in the terms and conditions of employment by his or her employer because of lawful acts done by the employee ... in furtherance of an action under this section ... shall be entitled to all relief necessary to make the employee whole.

Id. § 3730(h). To assert such a retaliation claim, the employee must show: (1) that he engaged in protected activity ("acts done ... in furtherance of an action under this section"); and (2) that he experienced discrimination "because of" his protected activity. **[**20]** *Id.* To establish the second element, the employee must demonstrate that the employer had knowledge of the employee's protected activity and that the retaliation was motivated by the protected activity. *See United States ex rel. Yesudian v. Howard Univ.*, 332 U.S. App. D.C. 56, 153 F.3d 731, 736 (D.C. Cir. 1998) (citing S. REP. NO. 99-345).

Shekoyan argues on appeal that the record raises a genuine issue of material fact regarding whether he engaged in "protected activity" under the FCA and therefore the district court erred in granting summary judgment to Sibley. HN16 Under FED. R. CIV. P. 56, summary judgment is appropriate only if there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 247-48, 91 L. Ed. 2d 202, 106 S. Ct. 2505 (1986). HN17 We review a grant of summary judgment *de novo*, applying the same standards as the district court, *Tao v. Freeh*, 307 U.S. App. D.C. 185, 27 F.3d 635, 638 (D.C. Cir. 1994), drawing all inferences from the evidence in favor of the non-movant. *Reeves v. Sanderson* [*423] *Plumbing Prods.*, 530 U.S. 133, 150, 147 L. Ed. 2d 105, 120 S. Ct. 2097 (2000). [**21]

We have held that HN18 the language of the FCA "manifests Congress' intent to protect employees while they are collecting information about a possible fraud, *before* they have put all the pieces of the puzzle together." *Yesudian*, 153 F.3d at 740 (emphasis in original). Thus, while the employee "must be investigating matters which are calculated, or reasonably could lead, to a viable FCA action," *United States ex rel. Hopper v. Anton*, 91 F.3d 1261, 1269 (9th Cir. 1996); *see also Neal v. Honeywell Inc.*, 33 F.3d 860, 864 (7th Cir. 1994), it is not necessary for a plaintiff "to 'know' that the investigation ... could lead to a False Claims Act suit." *Yesudian*, 153 F.3d at 741. Nevertheless, "mere dissatisfaction with one's treatment on the job is not ... enough. Nor is an employee's investigation of nothing more than his employer's non-compliance with federal or state regulations." *Id.* at 740. An employee does not engage in protected conduct if he "merely informs a supervisor of the problem." *Zahodnick v. IBM Corp.*, 135 F.3d 911, 914 (4th Cir. 1997).

HN19 Determining whether an employee has engaged in

protected [**22] conduct under the FCA is a "fact specific inquiry." *Hutchins v. Wilentz, Goldman & Spitzer*, 253 F.3d 176, 187 (3d Cir. 2001). Shekoyan has alleged several acts that could constitute fraud, including payment of full-time salaries to persons receiving full-time salaries from other employers and use of project resources for personal benefit--such as project vehicles and GEAR-financed private residences. Shekoyan reported his concerns to one of his supervisors and asked whether he should raise them with USAID; he was told to let Sibley investigate first. The district court found, however, that the basis of Shekoyan's complaints "was because the plaintiff was apparently denied the use of such vehicles and not that the conduct was fraudulent." *Shekoyan II*, 309 F. Supp. 2d at 18. Particularly significant is Shekoyan's own deposition testimony, to wit: "I have never concluded that there was corruption. I thought that there are some issues that need to be kind of addressed or corrected or fixed or I don't know, worked out, but I did not conclude that there was a [sic] corruption." Shekoyan's own statement manifests that he did no more than "inform[] a supervisor [**23] of [a] problem," *Zahodnick*, 135 F.3d at 914, and thus did not engage in "protected activity" under the FCA.

C. *The Pendent Claims*

Shekoyan contends that the district court erred when, after disposing of all of the federal claims upon which the court had exercised supplemental jurisdiction, it dismissed his pendent claims under District of Columbia law.

HN20 Whether to retain jurisdiction over pendent state and common law claims after the dismissal of the federal claims is "a matter left to the sound discretion of the district court" that we review for abuse of discretion only. *Edmondson & Gallagher v. Alban Towers Tenants Ass'n*, 310 U.S. App. D.C. 409, 48 F.3d 1260, 1265-66 (D.C. Cir. 1995).

HN21 "Pendent jurisdiction is a doctrine of discretion, not a

plaintiff's right." *United Mine Workers Ass'n v. Gibbs*, 383 U.S. 715, 726, 16 L. Ed. 2d 218, 86 S. Ct. 1130 (1966). HN22 A district court may choose to retain jurisdiction over, or dismiss, pendent state law claims after federal claims are dismissed. 28 U.S.C. § 1367(c)(3).[4] *Edmondson & Gallagher*, [*424] 48 F.3d at 1265-66. "In the usual case in which all federal-law [**24] claims are dismissed before trial, the balance of factors to be considered under the pendent jurisdiction doctrine--judicial economy, convenience, fairness, and comity--will point toward declining to exercise jurisdiction over the remaining state-law claims." *Carnegie-Mellon Univ. v. Cohill*, 484 U.S. 343, 350 n.7, 98 L. Ed. 2d 720, 108 S. Ct. 614 (1988). [**25]

Shekoyan argues that this is not "the usual case," *id.*, because the litigation proceeded for four years in the district court prior to the dismissal of the last of his federal claims and because the district judge was familiar with District of Columbia law, having served previously for 18 years as a D.C. Superior Court judge. Yet judicial economy is not the only relevant factor and the district court properly

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HN23 The statute provides that a district court may decline to exercise supplemental jurisdiction ... if:

(1) the claim raises a novel or complex question of State law,

(2) the claim substantially predominates over the claim or claims over which the district court has original jurisdiction,

(3) the district court has dismissed all claims over which it has original jurisdiction, or

(4) in exceptional circumstances, there are other compelling reasons for declining jurisdiction.

28 U.S.C. § 1367(c). HN24 In exercising its discretionary authority to retain or dismiss pendent claims, the district court is to be "guided by consideration of the factors enumerated in 28 U.S.C. § 1367(c)." *Edmondson & Gallagher*, 48 F.3d at 1266

considered comity as well as fairness to the plaintiff in concluding that its rejection of his non-federal claims would "not adversely impact plaintiff's ability to pursue [those] claims in the local court system." *Shekoyan II*, 309 F. Supp. 2d at 22. We find no abuse of discretion in the district court's dismissal of Shekoyan's pendent claims.

D. *Contested Procedural Orders*

Shekoyan also contests two procedural orders issued by the district court during the course of the litigation. The first is the district court's refusal to permit Shekoyan to file a motion for summary judgment after the deadline for filing dispositive motions. Order, Case No. 00-2519 (February 3, 2004) (summary judgment order). The second is the district court's denial of Shekoyan's **[**26]** motion for Rule 11 sanctions against Sibley's lawyers. Order, Case No. 00-2519 (February 17, 2004) (Rule 11 Order). We review both orders for abuse of discretion. *See Atchinson v. District of Columbia*, 315 U.S. App. D.C. 318, 73 F.3d 418, 424 (D.C. Cir. 1996) HN25 (reviewing denial of motion to amend complaint for abuse of discretion); *Cooter & Gell v. Hartmarx Corp.*, 496 U.S. 384, 405, 110 L. Ed. 2d 359, 110 S. Ct. 2447 (1990) HN26 ("An appellate court should apply an abuse-of-discretion standard in reviewing all aspects of a district court's Rule 11 determination."). HN27 In the Rule 11 context, we note that a district court "would necessarily abuse its discretion if it based its ruling on an erroneous view of the law or on a clearly erroneous assessment of the evidence." *Id.*

HN28 Rule 16 of the Federal Rules of Civil Procedure instructs the district court to "enter a scheduling order that limits the time ... to file motions [and] to complete discovery." FED. R. CIV. P. 16(b). On December 6, 2002 the district court issued a scheduling order that required all dispositive motions to be filed by March 28, 2003. Order, **[**27]** Case No. 00-2519 (December 6, 2002) (Scheduling

Order I). This deadline was later extended to April 28, 2003. Order, Case No. 00-2519 (February 24, 2003) (Scheduling Order II). Shekoyan filed his "Motion to File Motion for Summary Judgment Out of Time" on January 30, 2004--more than nine months after the deadline set by Scheduling Order **[*425]** II. Shekoyan's explanation for the delayed filing is that he had finally obtained an eyewitness declaration corroborating his allegations of discrimination at Sibley. Yet Shekoyan had earlier filed a motion to supplement his opposition to Sibley's motion for summary judgment with the newly obtained declaration, which allowed the district court to consider the material in evaluating whether summary judgment was warranted. *See* Summary Judgment Order. Moreover, corroboration of Shekoyan's version of the facts was irrelevant to the summary judgment analysis. HN29 At the summary judgment stage, all inferences from the evidence are to be drawn in favor of the non-movant. *Reeves*, 530 U.S. at 150. Thus, the district court was already under an obligation to accept as true Shekoyan's allegations of discrimination in ruling on Sibley's motion for **[**28]** summary judgment. We therefore conclude that the district court did not abuse its discretion in denying Shekoyan's motion.

HN30 Rule 11 of the Federal Rules of Civil Procedure provides for sanctions for filing a paper with the court "for any improper purpose," including harassment, delay or increasing the costs of an opponent in litigation. FED. R. CIV. P. 11(b)(1). Likewise, all legal and factual allegations made by a litigant before the court must be made in good faith. *Id.* Shekoyan filed his motion for Rule 11 sanctions in response to Sibley's motion to strike from the record the disputed unsigned and unnotarized affidavits submitted by Shekoyan's lawyer. Rule 11 Order at 11. Shekoyan accused Sibley's lawyers of bad faith in filing the motion to strike, eliciting perjured testimony and manipulating witnesses, and violating the district court's Local Rule 7(m), which requires

counsel to confer with opposing counsel before filing non-dispositive motions. *See* Rule 11 Order at 11-12; LCvR 7(m). In particular, Shekoyan claimed to have an audio recording of his lawyer's conversation with David Bose that **[**29]** verified the content of the draft declaration and established Sibley's witness manipulation. The district court found that the motion to strike was justified but that Sibley had violated Local Rule 7(m) by failing to discuss the motion with Shekoyan. Despite being "troubled" by the competing claims of inaccuracy with respect to the Bose and Vanderhoof declarations, the court refused to "sift through" the audio recording in order to determine which party's account was accurate. Rule 11 Order at 12-13. Instead, it ruled that Shekoyan could use the recording to impeach Sibley's witnesses at trial. *Id.* at 13. The Supreme Court has instructed that: HN31"the district court is best acquainted with the local bar's litigation practices and thus best situated to determine when a sanction is warranted to serve Rule 11's goals." *Cooter & Gell*, 496 U.S. at 404. HN32We ordinarily find that "decisions concerning Rule 11 sanctions are better left to the discretion of the district court which has a bird's eye view of the actual positions taken by the litigants," *Corley v. Rosewood Care Ctr., Inc.*, 388 F.3d 990, 1013 (7th Cir. 2004) (citing *Brandt v. Schal Assoc., Inc.*, 960 F.2d 640, 645 (7th Cir. 1992)), **[**30]** and will not second guess the factual determinations integral to the district court's decision not to impose Rule 11 sanctions.

For the foregoing reasons, the decision of the district court is affirmed.

So ordered.

Vladmir Shekoyan,
Appellant

v.
Sibley International,

Appellee

No. 04-7040

UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

2005 U.S. App. LEXIS 19630

September 9, 2005, Filed

PRIOR HISTORY: |*1| 00cv02519. Shekoyan v. Sibley Int'l, 409 F.3d 414, 2005 U.S. App. LEXIS 10174 (D.C. Cir., 2005)

JUDGES: BEFORE: Sentelle, Henderson, and Rogers, Circuit Judges.

OPINION: ORDER

Upon consideration of appellant's petition for rehearing filed July 5, 2005, and the supplement thereto, it is

ORDERED that the petition be denied.

Per Curiam

Vladmir **Shekoyan,** Appellant v. **Sibley** International, Appellee

No. 04-7040

UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

2005 U.S. App. LEXIS 19637

September 9, 2005, Filed

PRIOR HISTORY: [*1] 00cv02519. Shekoyan v. Sibley Int'l, 409 F.3d 414, 2005 U.S. App. LEXIS 10174 (D.C. Cir., 2005)

JUDGES: BEFORE: Ginsburg, Chief Judge, and Edwards, Sentelle, Henderson, Randolph, Rogers, Tatel, Garland, Roberts, * Brown and Griffith, Circuit Judges.

* Circuit Judge Roberts did not participate in this matter.

OPINION: ORDER

Upon consideration of appellant's petition for rehearing en banc, the supplement thereto, and the absence of a request by any member of the court for a vote, it is

ORDERED that the petition be denied.

Per Curiam

VLADIMIR SHEKOYAN, Plaintiff,
v.
SIBLEY INTERNATIONAL CORP., Defendant.

Civil Action No. 00-2519 (RBW)

UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA

217 F. Supp. 2d 59; 2002 U.S. Dist. LEXIS 15839; 89 Fair Empl. Prac. Cas. (BNA) 1738

August 16, 2002, Decided
August 19, 2002, Filed

SUBSEQUENT HISTORY: Summary judgment granted by, Claim dismissed by Shekoyan v. Sibley Int'l Corp., 2004 U.S. Dist. LEXIS 4845 (D.D.C., Mar. 19, 2004)

DISPOSITION: [**1] Defendant's motion to dismiss granted in part and denied in part.

COUNSEL: Dawn V. Martin, Esquire, Law Office of Dawn V. Martin, Washington, DC, for Plaintiff.

Melody A. Rosenberry, Mintz, Levin, Cohn, Ferris, Glovsky & Popeo, P.C., Reston, VA, for Defendant.

JUDGES: REGGIE B. WALTON, UNITED STATES DISTRICT JUDGE.

OPINIONBY: REGGIE B. WALTON

OPINION: [*61]

MEMORANDUM OPINION

This matter comes before the Court upon Defendant Sibley International Corporation's ("Sibley") Motion to Dismiss the plaintiff's Complaint that alleges (1) discrimination on the basis of national origin in violation of Title VII of the Civil Rights Act of 1964, 42 U.S.C. §§ 2000(e)et seq., (2000); (2) discrimination on the basis of national origin in violation of Presidential Executive Order ("E.O.") 11,246, Exec. Order No. 11,246, 30 Fed. Reg. 12,319 (Sept. 24, 1965); (3) retaliatory termination of his employment in violation of the whistleblower provision of the False Claims Act ("FCA"), 31 U.S.C. § 3730(h) (2000); (4) discrimination on the basis of national origin in violation of the District of Columbia **[*62]** Human Rights Act ("DCHRA"), D.C. Code §§ 2-1401.1-1403.17 (2001) **[**2]** ; and District of Columbia common law claims of (5) breach of contract; (6) defamation; and (7) intentional infliction of emotional distress. Compl. PP 1-3. Specifically, the defendant seeks dismissal of the plaintiff's Title VII, E.O. 11,246, and common law claims[1] pursuant to Rule 12(b)(1) of the Federal Rules of Civil Procedure for lack of subject matter jurisdiction and the plaintiff's FCA claim pursuant to Rule 12(b)(6) of the Federal Rules of Civil Procedure for failure to state a claim upon which relief can be granted. Fed. R. Civ. P. 12(b)(1), 12(b)(6). Upon consideration of the parties' submissions and for the reasons set forth below, the Court must grant the defendant's motion to dismiss the plaintiff's Title VII and Executive Order 11,246 claims, and deny the defendant's motion to dismiss the plaintiff's False Claims Act and state law claims.[2] **[**3]**

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[1] The plaintiff's DCHRA, breach of contract, defamation, and intentional infliction of emotional distress claims are collectively referred to as the "state law claims."

[2] In connection with this motion, the Court has reviewed the following pleadings and filings: (1) the Complaint ("Compl."); (2) Defendant Sibley's Motion to Dismiss; (3) the Memorandum of Points and Authorities in Support of Defendant Sibley's Motion to Dismiss ("Def.'s Mem."); (4) Plaintiff's Opposition to Defendant's Motion to Dismiss

I. Background

A brief recitation of the facts that underlie the filing of this case is a necessary prelude to the Court's analysis of the legal arguments raised in the parties' pleadings. The plaintiff asserts that he is an "Armenian-born permanent legal resident of the United States." Compl. P 5. In January 1998, the defendant hired the plaintiff to be a training advisor for a project that would be performed in the Republic of Georgia. Id. PP 10, 17. The plaintiff was hired by, trained at, and reported to the defendant's corporate headquarters in the District of Columbia. Id. PP 13-16. The plaintiff's primary workstation, however, was located in the Republic of Georgia. Id. Ex. C. Because the defendant received funding for the project from the United States Agency for International Development ("USAID"),[3] the plaintiff's employment agreement was subject to the policies and regulations of USAID and listed the termination date of the USAID contract as the anticipated date for the termination of his employment contract. Id. P 11, Ex. C. The plaintiff contends that his immediate supervisor at the Republic of Georgia job site created a hostile work environment when [**4] he discriminated against the plaintiff because of the plaintiff's national origin. Id. P 27. The plaintiff also asserts that he informed management officials at Sibley about the alleged discrimination, that he reported the misappropriation of USAID funds by his immediate supervisor to management officials at the defendant's headquarters in Washington, D.C., and that he was advised by those officials not to "make too much noise" about the misuse of funds. Id. PP 54, 68.

When USAID decided to extend its contract with the

("Pl.'s Opp'n"); and (5) Defendant's Memorandum of Point and Authorities in Reply to Plaintiff's Opposition to the Motion to Dismiss.

[3] The USAID is a subdivision of the United States Department of State. Pl.'s Opp'n at 1.

defendant, the defendant chose not to extend the plaintiff's employment agreement beyond the originally anticipated termination date. Id. P 61, Ex. D. The plaintiff asserts that his immediate supervisor sent an electronic (e-mail) message to project employees stating that the plaintiff's employment had been terminated because he "does not follow ... instructions and does not recognize his **[**5]** [supervisor's] **[*63]** authority." Id. P 64. The defendant contends that the USAID extension required a change in staffing requirements, id. ex. D, and that the plaintiff did not have the skills required by USAID for the extension. Def.'s Mem. at 2. In his Complaint, however, the plaintiff contends that both the defendant and the Republic of Georgia praised him for his work on the project. Compl. P 23. Following the termination of his employment, the plaintiff filed his pro se Complaint.[4]

II. Standards of Review

(A) Rule 12(b)(1)

HN1 Federal Rule of Civil Procedure 12(b)(1) requires that the plaintiff bear the burden of establishing by a preponderance of the evidence that the court has jurisdiction to entertain his claims. Fed. R. Civ. P. 12(b)(1); Grand Lodge of Fraternal Order of Police v. Ashcroft, 185 F. Supp. 2d 9, 13 (D.D.C. 2001) (holding that the court has an "affirmative **[**6]** obligation to ensure that it is acting within the scope of its jurisdictional authority."); Pitney Bowes, Inc. v. United States Postal Serv., 27 F. Supp. 2d 15, 18 (D.D.C. 1998); Darden v. United States, 18 Cl. Ct. 855, 859 (Cl. Ct. 1989). While the Court must accept as true all the factual allegations contained in the complaint when reviewing a motion to dismiss pursuant to Rule 12(b)(1), Leatherman v. Tarrant County Narcotics Intelligence & Coordination Unit, 507 U.S. 163, 164, 122 L. Ed. 2d 517,

[4] The plaintiff has subsequently retained counsel, but an amended complaint has not been filed.

113 S. Ct. 1160 (1993), because the plaintiff has the burden of proof to establish jurisdiction, the "'plaintiff's factual allegations in the complaint ... will bear closer scrutiny in resolving a 12(b)(1) motion' than in resolving a 12(b)(6) motion for failure to state a claim." Grand Lodge of Fraternal Order of Police, 185 F. Supp. 2d at 13-14 (citation omitted). However, in deciding a 12(b)(1) motion, the Court is not limited to the allegations in the complaint but may consider "'such materials outside the pleadings as it deems appropriate to resolve the question whether it has jurisdiction in the case.'" Id. at 14 [**7] (citations omitted).

(B) Rule 12(b)(6)

HN2 On a motion to dismiss for failure to state a claim upon which relief can be granted pursuant to Federal Rule of Civil Procedure 12(b)(6), the allegations and facts in the complaint are to be construed in the plaintiff's favor, and the Court must grant the plaintiff the benefit of all inferences that can be derived from the alleged facts. Conley v. Gibson, 355 U.S. 41, 45-46, 2 L. Ed. 2d 80, 78 S. Ct. 99 (1957); Kowal v. MCI Communications Corp., 305 U.S. App. D.C. 60, 16 F.3d 1271, 1276 (D.C. Cir. 1994). HN3 The Federal Rules only require that a complaint include "a short and plain statement of the claim showing that the pleader is entitled to relief," Fed. R. Civ. P. 8(a)(2), because the complaint "must simply 'give the defendant fair notice of what the plaintiff's claim is and the grounds upon which it rests.'" Swierkiewicz v. Sorema N.A., 534 U.S. 506, , 152 L. Ed. 2d 1, 122 S. Ct. 992, (2002) (quoting Conley, 355 U.S. at 47). HN4 In deciding whether to dismiss a complaint under Rule 12(b)(6), the Court will consider the facts alleged in the [**8] pleadings, documents attached as exhibits or incorporated by reference in the pleadings, and matters about which the Court may take judicial notice. EEOC v. St. Francis Xavier Parochial Sch., 326 U.S. App. D.C. 67, 117 F.3d 621, 624-25 (D.C. Cir. 1997); Phillips v. Bureau of

Prisons, 192 U.S. App. D.C. 357, 591 F.2d 966, 969 (D.C. Cir. 1979). While this theory of "notice pleading" generally [*64] applies to all civil actions, because the plaintiff's FCA claim is an allegation of fraud, it must also comply with Federal Rule of Civil Procedure 9(b). United States ex rel. Totten v. Bombardier Corp., 286 F.3d 542, 544 (D.C. Cir. 2002). Rule 9(b) "provides for greater particularity in all averments of fraud or mistake," to accomplish the goal of 'fair notice' to the defendant. Swierkiewicz, 122 S. Ct. at 998.

However, as HN5 the plaintiff filed a pro se complaint, the Court must hold the complaint "to less stringent standards than formal pleadings drafted by lawyers." Haines v. Kerner, 404 U.S. 519, 521, 30 L. Ed. 2d 652, 92 S. Ct. 594 (1972). Therefore, even when a claim of fraud is pled, this Court will "read [**9] [a] pro se complaint[] liberally and broadly" and will only dismiss the pro se complaint for failure to state a claim upon which relief can be granted if "it appears beyond doubt that the plaintiff can 'prove no set of facts in support of his claim that would entitle him to relief.'" Id.; see Price v. Phoenix Home Life Ins., Co., 44 F. Supp. 2d 28, 31 (D.D.C. 1999). Nonetheless, some degree of particularity regarding a claim of fraud must be pled even by a pro se litigant to satisfy Rule 9(b). Floyd v. Brown & Williamson Tobacco Corp., 159 F. Supp. 2d 823, 832 (E.D. Pa. 2001) ("While plaintiff is proceeding pro se, and his pleadings must be construed liberally, plaintiff is not relieved of the requirements of Rule 9(b).").

III. Analysis

(A) Plaintiff's Title VII Claim

HN6 Title VII of the Civil Rights Act of 1964 was enacted by Congress to "assure equality of employment opportunities and to eliminate those discriminatory practices and devices which have fostered racially stratified job environments to the disadvantage of minority citizens." McDonnell Douglas

Corp. v. Green, 411 U.S. 792, 800, 36 L. Ed. 2d 668, 93 S. Ct. 1817 (1973). [**10] To accomplish these goals, Congress mandated that

HN7 it shall be an unlawful employment practice for an employer to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin. 42 U.S.C. § 2000e-2(a)(1). Prior to the enactment of the Civil Rights Act of 1991, federal courts limited their interpretation of the scope of Title VII's reach, extending its protections only domestically, to both American citizens and aliens working in the United States. EEOC v. Arabian Am. Oil Co., 499 U.S. 244, 113 L. Ed. 2d 274, 111 S. Ct. 1227 (1991) (Court held that Title VII does not have an extraterritorial application to the employment of American citizens abroad by United States firms), superceded by Civil Rights Act of 1991, Pub. L. No. 102-166, § 109(a) (1991) (codified as amended at 42 U.S.C. § 2000e(f)) (1991 amendments to Title VII did not overrule Supreme Court's determination that Title VII is inapplicable [**11] to aliens employed outside the United States); Espinoza v. Farah Mfg. Co., 414 U.S. 86, 95, 38 L. Ed. 2d 287, 94 S. Ct. 334 (1973) (holding that Title VII covers aliens employed in the United States). In light of the Supreme Court's decision in Arabian Am. Oil rejecting an extraterritorial application of Title VII to American citizens employed abroad by United States companies, HN8 Congress enacted the Civil Rights Act of 1991 and amended Title VII to give the statute limited extraterritorial reach. United States v. Wilkinson, 169 F.3d 1236, 1238 (10th Cir. 1999) (recognizing that Arabian Am. Oil was superceded by statute); Arno v. Club Med Inc., 22 F.3d 1464, 1472 (9th Cir. 1994) ("In Arabian Am. Oil (citation [*65] omitted) the Court held that an employer is not liable under Title VII for employment discrimination that

occurs outside of the United States. Though Congress changed that law in the Civil Rights Act of 1991 ..."); Flatow v. Islamic Republic of Iran, 999 F. Supp. 1, 15 (D.D.C. 1998) (recognizing that Arabian Am. Oil was superceded by statute); Iwata v. Stryker Corp., 59 F. Supp. 2d 600, 603-04 (N.D. Tex. 1999) **[**12]** (noting that the Court's decision in Arabian Am. Oil held that employers were not liable under Title VII for discrimination against United States citizens occurring outside of the United States. "However, by year's end, Congress ostensibly declared its contrary legislative intent with the enactment of the Civil Rights Act of 1991."). First, the amended Act expands Title VII's definition of "employee" to include United States citizens employed abroad. 42 U.S.C. § 2000e(f) ("With respect to employment in a foreign county, such term [employee] includes an individual who is a citizen of the United States."). Second, Congress explicitly precluded Title VII's extraterritorial scope from covering aliens. 42 U.S.C. § 2000e-1 ("This subchapter shall not apply to an employer with respect to the employment of aliens outside any State ...."). [5] Finally, this amended language extended Title VII abroad only to corporations controlled by United States employers. 42 U.S.C. § 2000e-1(c). **[**13]**

(1) Limitations of the Extraterritorial Reach of Title VII Although the plaintiff claims that he is a United States national, and not an alien, and therefore is protected by Title VII, it is clear from this Court's discussion above that Congress has provided that HN10 Title VII will only have an extraterritorial application when: (1) the employee is a United States citizen and (2) the employee's company is controlled by an American employer. Iwata, 59 F. Supp. 2d at 604. While Congress certainly "has the authority to

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[5] HN9 Title VII's definition of 'State' includes "a State of the United States, [and] the District of Columbia ..." 42 U.S.C. § 2000e(i).

enforce its laws beyond the territorial boundaries of the United States", there must be evidence of its intent to do so in the plain language of the statute. Arabian Am. Oil, 499 U.S. at 248 (citing Foley Bros., Inc. v. Filardo, 336 U.S. 281, 284-85, 93 L. Ed. 680, 69 S. Ct. 575 (1949); Benz v. Compania Naviera Hidalgo, S.A., 353 U.S. 138, 147, 1 L. Ed. 2d 709, 77 S. Ct. 699 (1957)). HN11 It is a general principle that

> because statutory language represents the clearest indication of Congressional intent,, ... [this Court] must presume that Congress meant precisely what it said. Extremely strong, **[**14]** this presumption is rebuttable only in the "rare cases [in which] the literal application of a statute will produce a result demonstrably at odds with the intentions of its drafters."

Nat'l Pub. Radio, Inc. v. FCC, 254 F.3d 226, 230 (D.C. Cir. 2001) (quoting United States v. Ron Pair Enters., 489 U.S. 235, 242, 103 L. Ed. 2d 290, 109 S. Ct. 1026 (1989), and citing Qi-Zhuo v. Meissner, 315 U.S. App. D.C. 35, 70 F.3d 136, 140 (D.C. Cir. 1995) ("HN12 Where ... the plain language of the statute is clear, the court generally will not inquire further into its meaning.")). HN13 An examination of the plain language of the Civil Rights Act of 1991 demonstrates that Title VII will only apply extraterritorially to United States citizens. Title VII's definition of "employee" was specifically amended to reflect that "with respect to employment in a foreign county, such term [employee] includes an individual **[*66]** who is a citizen of the United States." 42 U.S.C. § 2000e(f). If Congress had intended to extend Title VII's scope to protect non-United States citizens working abroad for American controlled companies, it could very well have **[**15]** included such individuals in its definition of employee. See Iwata, 59 F. Supp. 2d at 604 (holding that if Congress intended for Title VII to extend to

foreign nationals working outside of the United States, it had the opportunity to do so). IINIS While Congress did not explicitly address the extraterritorial reach of Title VII to non-citizen United States nationals in the Civil Rights Act of 1991,[6] Congress was abundantly clear that Title VII's protections would not be extended abroad to aliens. 42 U.S.C. § 2000e-1 ("This subchapter shall not apply to an employer with respect to the employment of aliens outside any State ...."); see Arabian Am. Oil, 499 U.S. at 246; Mota v. Univ. of Tex. Houston Health Sci. Ctr., 261 F.3d 512, 524 n.34 (5th Cir. 2001); Mithani v. Lehman Bros., 2001 U.S. Dist. LEXIS 21906, No. 01 CIV 5927, 2002 WL 14359, at *1 (S.D.N.Y. Jan. 4, 2002); Iwata, 59 F. Supp. 2d at 604. Since Title VII's reach does not extend to non-United States citizens employed outside of the United States, the Court must address (1) the plaintiff's immigration status and (2) the location of his employment. **[**16]**

(a) Plaintiff's Immigration Status

While the plaintiff, an Armenian-born permanent legal resident of the United States, attempts to circumvent Title VII's explicit exclusion of aliens by asserting that he is a non-citizen United States national, the Court finds that he is subject to Title VII's explicit alien exemption.[7] Although IINIS the plaintiff bears the burden of establishing by a preponderance of the evidence that this court has jurisdiction to entertain his claims, Fed. R. Civ. P. 12(b)(1); Grand Lodge of Fraternal Order of Police, 185 F. Supp. 2d at 13; Pitney Bowes, 27 F. Supp. 2d at 18; Darden, 18 Cl. Ct. at

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[6] That Congress did not address non-citizen United States nationals in the Civil Rights Act of 1991 is not surprising because of the extremely constricted nature of those who qualify as nationals, as fully set forth below.

[7] Because the plaintiff is an alien, the Court need not address the issue of Title VII's applicability to non-citizen United States nationals who are employed abroad.

859, and therefore that he should be considered a United States national, the plaintiff simply asserts that the defendant [**17] characterized him as a United States national for purposes of its contract with USAID, and that he was subject to the laws of the United States as a result of the residence he maintained in the United States. Pl.'s Opp'n at 11-13. However, plaintiff's bald assertion on these points are not sufficient to prove that he is a United States national.

A non-citizen United States national is a fairly constricted category. Several federal courts that have addressed the definition of the term "national" recognize that it "came into popular use in this country when the United States acquired territories outside its continental limits, and was used in reference to noncitizen inhabitants of those territories." Rabang v. INS, 35 F.3d 1449, 1452 n.5 (9th Cir. 1994) (citing 4 Charles Gordon and Stanley Mailman, Immigration Law and Procedure, [**18] § 91.01 [3][b], at 91-5 (1993)); see United States v. Sotelo, 109 F.3d 1446, 1448 (9th Cir. 1997); Oliver v. United States Dep't of Justice, 517 F.2d 426, 428 n.3 (2d Cir. 1975). HN16 The Immigration and Nationality Act defines a "national of the United States [as] (A) a citizen of the United States, or (B) a person, who, though not a citizen of the United States, owes permanent allegiance to the United States." 8 U.S.C. § 1101(a)(22) (2000). Therefore, [*67] because the plaintiff claims that he is non-citizen United States national, this Court must determine whether the plaintiff has offered any proof indicating that he "owes permanent allegiance to the United States." Id.

The Second Circuit in Oliver, determined that a Canadian citizen who was a twenty-year permanent resident of the United States and who had married an American citizen was not a national because the court found that she had failed to begin the naturalization process and was therefore deemed to still owe allegiance to Canada. 517 F.2d at 427-28. The

Eighth Circuit in Carreon-Hernandez v. Levi, 543 F.2d 637 (8th Cir. 1976), [**19] relying on Oliver, found a Mexican citizen who was a twenty-year permanent resident of the United States, married to an American citizen, and living "an exemplary life, working, paying taxes, registering for the Selective Service, etc." not a national because he "never applied for United States citizenship." Id. The Ninth Circuit, relying on both Oliver and Carreon-Hernandez, concluded that an individual born outside of the United States, or one of its territories, must, at a minimum, demonstrate that he or she applied for United States citizenship. Hughes v. Ashcroft, 255 F.3d 752, 756-57. Thus, HN17 courts have found an application for citizenship to be "the most compelling evidence of permanent allegiance to the United States short of citizenship itself." United States v. Morin, 80 F.3d 124, 126 (4th Cir. 1996). In light of this minimal requirement of an application for citizenship to qualify as a United States national and the plaintiff's failure to show that he has submitted such an application, the Court must find that the plaintiff has failed to establish by a preponderance of the evidence that he is a United States national. The [**20] plaintiff has simply stated that "[a] person who is not a citizen of the United States may apply to the Secretary of State for a certificate stating that he/ she is an 'American national' for judicial or administrative proceedings abroad. 8 U.S.C. § 1502." Pl.'s Opp'n at 10. However, the plaintiff has not provided the Court with any evidence that he has attained such a certificate. Therefore, this Court concludes that the plaintiff is considered an alien pursuant to 8 U.S.C. § 1101(a)(3) ("HN18 The term 'alien' means any person not a citizen or national of the United States). Thus, Title VII's scope will not extend its protections to the plaintiff if his primary workstation is considered extraterritorial.

(2) Location of Plaintiff's Employment

The plaintiff also asserts that Title VII's protections apply

because the defendant "recruited, interviewed, hired, and trained Plaintiff" and made its decisions regarding his employment status in the United States. Pl.'s Opp'n at 22. The location of the alleged discriminatory employment of a non-citizen is critical to a Title VII analysis because, as discussed above, this remedial statute only **[**21]** extends to the boundaries of the United States. Left with the question of the location of the plaintiff's employment, this Court finds relevant, in its analysis of the scope of Title VII, 42 U.S.C. § 2000e(f), the conclusions of courts that have addressed the extraterritorial limits of the Age Discrimination in Employment Act ("ADEA"), 29 U.S.C. § 630(f) (1999). Mithani, 2001 U.S. Dist. LEXIS 21906, 2002 WL 14349, at *1; Iwata, 59 F. Supp. 2d at 604; Gantchar v. United Airlines, Inc., 1995 U.S. Dist. LEXIS 3910, 1995 WL 137053, at *6 (N.D. Ill. Mar. 28, 1995); Akgun v. Boeing Co., 1990 U.S. Dist. LEXIS 11845, 1990 WL 112609, at *4 (W.D. Wash. June 7, 1990) (holding that [illegible] ADEA and Title VII have similar legislative goals and the 1984 amendment to the ADEA was designed to extend coverage to United States citizens abroad to bring it **[*68]** into conformity with Title VII). The Court finds particularly noteworthy that Title VII and the ADEA's "provisions defining 'employee' and outlining foreign employment are virtually identical", Iwata, 59 F. Supp. 2d at 604, as both are limited in their extraterritorial application to: (1) United States citizens **[**22]** and (2) employers controlled by an American company. Compare 42 U.S.C. § 2000e(f) ("With respect to employment in a foreign country, [employee] includes an individual who is a citizen of the United States."), with its ADEA counterpart, 29 U.S.C. § 630(f) (1999) ("The term 'employee' includes any individual who is a citizen of the United States employed by an employer in a workplace in a foreign country."); see Denty v. Smithkline Beecham Corp., 109 F.3d 147, 150 (3rd Cir. 1997) (defining the 1984 extraterritorial amendments to the ADEA).

IIN20 A determination of a plaintiff's location of employment for both Title VII and ADEA purposes focuses on the location of the employee's primary workstation. Denty, 109 F.3d at 150 (court determined that the work site was abroad although employment decisions were made within the United States); Pfeiffer v. W.M. Wrigley Jr., Co., 755 F.2d 554 (7th Cir. 1985) (plaintiff was company's director abroad and therefore court held that his place of employment was abroad); Iwata, 59 F. Supp. 2d at 603-04 (non-citizen's work was performed |**23| abroad); Hu v. Skadden, Arps, Slate, Meagher & Flom, LLP, 76 F. Supp. 2d 476, 477 (S.D.N.Y. 1999) (court found fact that defendant conducted interviews and may have made hiring decisions in United States did not render employment in the United States because the work non-citizen plaintiff was to perform was abroad); O'Loughlin v. Pritchard Corp., 972 F. Supp. 1352, 1363-64 (D. Kan. 1997) (court found that non-citizen plaintiff's employment was abroad even though he was hired in the United States and did some of his training in the United States); Gantchar, 1995 U.S. Dist. LEXIS 3910, 1995 WL 137053, at *6; Wolf v. J.I. Case Co., 617 F. Supp. 858, 863 (E.D. Wis. 1985) (holding that plaintiff's employment was abroad where he performed his duties outside of the United States, but made numerous business trips to the United States). Courts have been consistently clear that an individual, whose primary workstation is abroad, cannot characterize otherwise extraterritorial employment as domestic solely because employment decisions were made and the training occurred for such jobs in the United States. Denty, 109 F.3d at 150; Pfeiffer, 755 F.2d at 555; |**24| Hu, 76 F. Supp. 2d at 477; Gantchar, 1995 U.S. Dist. LEXIS 3910, 1995 WL 137053, at *6; O'Loughlin, 972 F. Supp. at 1363-64. In this case, the Court must conclude that the plaintiff's primary workstation, and thus his place of employment, was located outside the United States, in the Republic of Georgia, throughout his employment with the defendant. Compl. P 21, Ex. C. This is evidenced by the fact that the plaintiff was specifically hired

by the defendant to work in the Republic of Georgia and performed his primary work related duties there. Def.'s Mot. Ex. 2. Under such circumstances in which the plaintiff does not dispute that his employment was located in the Republic of Georgia, but instead claims that Title VII's protections apply because employment decisions and training occurred in the United States, this Court, as have other courts, must find that the plaintiff's primary workstation was extraterritorial.

In sum, because the Court finds that the plaintiff is a permanent resident alien, who was employed extraterritorially, he is outside the scope of the protections of Title VII. The Court therefore lacks subject matter jurisdiction over the plaintiff's **[**25]** Title **[*69]** VII discrimination claim and must grant defendant's motion to dismiss the Title VII claim pursuant to Federal Rule of Civil Procedure 12(b)(1).

(2) Executive Order 11,246 Claim

HN21 Executive Order 11,246 "establishes a program to eliminate employment discrimination by the Federal Government and by those who benefit from Government contracts." Chrysler Corp. v. Brown, 441 U.S. 281, 304, 60 L. Ed. 2d 208, 99 S. Ct. 1705 (1979); 30 Fed. Reg. 12,319 (1965). While the plaintiff has filed a claim under Executive Order 11,246, this Court, however, as a threshold matter must first determine whether it has jurisdiction to entertain the claim. Steel Co. v. Citizens for a Better Env't, 523 U.S. 83, 94, 140 L. Ed. 2d 210, 118 S. Ct. 1003 (1998). As the Supreme Court stated in Ex Parte McCardle, 74 U.S. 506, 7 Wall. 506, 514, 19 L. Ed. 264 (1868),

HN22 without jurisdiction the court cannot proceed at all in any cause. Jurisdiction is power to declare law, and when it ceases to exist, the only function remaining to the court is that of announcing the fact and dismissing the cause. And

this is not less clear upon [**26] authority than upon principle.

HN23 This Court is conferred jurisdiction over "federal questions" pursuant to 28 U.S.C. § 1331 (2000), which provides that "the district courts shall have original jurisdiction of all civil actions arising under the Constitution, laws, or treaties of the United States." While federal courts have determined that some executive orders have the force of law, and therefore controversies regarding them "arise[] under ... laws ... of the United States," the question that must be first resolved is "'whether or to what extent Congress did grant ... such authority' to the executive branch of the government."[8] Liberty Mut. Ins. Co. v. Friedman, 639 F.2d 164, 168 (4th Cir. 1981). The "origins of congressional authority for Executive Order 11,246 are somewhat obscure and have been roundly debated by commentators and

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[8] This Court is reminded of Justice Jackson's analysis in Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579, 634-55, 96 L. Ed. 1153, 72 S. Ct. 863, 47 Ohio Op. 430, 62 Ohio Law Abs. 417 (1952), when he discussed judicial review of claims that the President has unconstitutionally exceeded his authority:

HN25 1. When the President acts pursuant to an express or implied authorization of Congress, his authority is at its maximum, for it includes all that he possesses in his own right, plus all that Congress can delegate. In these circumstances, and in these only, may he be said (for what it may be worth) to personify the federal sovereignty ...

2. When the President acts in the absence of either a congressional grant or denial of authority he can only rely upon his own independent powers, but there is a zone of twilight in which he and Congress may have concurrent authority, or in which its distribution is uncertain. Therefore, congressional inertia, indifference or quiescence may sometimes, at least as a practical matter, enable, if not invite, measures on independent presidential responsibility. In this area, any actual test of power is likely to depend on the imperatives of events and contemporary imponderables rather than on abstract theories of law.

3. When the President takes measures incompatible with the expressed or implied will of Congress, his power is at its lowest ebb, for then he can rely only upon his own constitutional powers, minus any constitutional powers of Congress over the matter.

courts." Chrysler Corp., 441 U.S. at 304. However, this Court, like the Supreme Court in Chrysler Corp., notes that it is not necessary to decide what legislative grant authorized the President to issue Executive Order 11,246, because even if this Executive Order was authorized pursuant [**27] to a valid grant of legislative authority, n9 there is no private cause of [*79] action available to the plaintiff. HN24 An examination of Executive Order 11,246 reveals that it is devoid of a provision that provides for a private cause of action against a non-complying contractor. 30 Fed. Reg. 12,319 (1965); see Women's Equity Action League v. Cavazos, 285 U.S. App. D.C. 48, 906 F.2d 742, 750 (D.C. Cir. 1990) (citing Utley v. Varian Assocs., 811 F.2d 1279, 1285-86 & n.4 (9th Cir.), cert. denied, 484 U.S. (1987)); Brug v. Nat'l Coalition for the Homeless, 45 F. Supp. 2d 33, 41 (D.D.C. 1999). Instead, the Order provides for

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[9] The Supreme Court in Chrysler Corp. noted that there has been a wide array of debate over whether Executive Order 11,246 was promulgated pursuant to legislative authority granted in: the Federal Property and Administrative Services Act of 1949, 40 U.S.C. § 471; Titles VI and VII of the Civil Rights Act of 1964, 42 U.S.C. §§ 2000d to 2000d-4, 2000e to 2000e-17; the Equal Employment Opportunity Act of 1972; and 5 U.S.C. § 301 or commonly referred to as the "housekeeping statute". Id. at 304-08; see Trucking Mgmt., Inc. v. EEOC, 662 F.2d 36, 43-45 (D.C. Cir. 1981) (affirming trial court decision that Congress did not intend to permit E.O. 11,246 to override bona fide, neutral seniority systems); Miss. Power & Light Co. v. United States, 638 F.2d 899, 905 (5th Cir. 1981) (holding that E.O. 11,246 is firmly rooted in congressionally delegated authority); New Orleans Pub. Servs. Inc. v. United States, 553 F.2d 459, 467-68 (5th Cir. 1977) (identifying three sources of legislative authorization for E.O. 11,246), vacated on other grounds by 436 U.S. 942 (1978); Farmer v. Philadelphia Elec. Co., 329 F.2d 3 (3d Cir. 1964) (suggesting that the Federal Property and Administrative Services Act of 1949 ("FPASA") was the authority for predecessors of E.O. 11,246), Contractors Ass'n E. Pa. v. Shultz, 442 F.2d 159, 174-75 (3d Cir. 1971) (holding that E.O. 11,246 is authorized by the broad grant of procurement authority with respect to Titles 40 and 41); Farkas v. Tex. Instrument, Inc., 375 F.2d 629 (5th Cir. 1967) (holding generally that Congress granted the President the necessary authority to enact anti-discrimination executive orders under the FPASA),cert. denied, 389 U.S. 977, 19 L. Ed.

enforcement by the Department of Labor, to which the President's authority to investigate non-compliance and pursue criminal and/or civil proceedings is delegated. Id. The Third Circuit has commented that:

the history of the executive orders on the subject [of nondiscrimination in Government

contracts] from 1951 to the present all point to the conclusion that the enforcement of the

nondiscrimination provisions in Government contracts has been entrusted to one or more of the Governmental agencies [**28] with the assistance of a committee appointed by the President. [10] [**29] [**30]

Farmer v. Philadelphia Elec. Co., 329 F.2d 3, 8 (3rd Cir. 1964); see Farkas v. Texas Instrument, Inc., 375 F.2d 629, 632 (5th Cir. 1967). Therefore, because it is clear that Executive Order 11,246 does not provide for a private cause of action, the plaintiff's claim filed pursuant to it must be dismissed.

(C) The "Whistleblower Provision" of the False Claims Act

The FCA, 31 U.S.C. §§ 3729-3733 (2000), was originally enacted in 1863 following "congressional investigations into the sale of provisions and munitions to the War Department"

2d 471, 88 S. Ct. 480 (1967); S. Ill. Builders Ass'n v. Ogilvie, 327 F. Supp. 1154, 1161 (S.D. Ill. 1971) (assuming that E.O. 11,246 is properly rooted in congressionally delegated authority); but see Liberty Mut. Ins. Co. v. Friedman, 639 F.2d 164, 170-73 (4th Cir. 1981) (invalidating agency regulation under E.O. 11,246 because no statutory grant of congressional authority).

[10]Moreover, courts have also rejected third-party beneficiary claims pursuant to agreements between the government and contractors as an attempt to circumvent the lack of a private cause of action in Executive Order 11,246. Brue, 45 F. Supp. 2d at 41 (citations omitted).

during the Civil War. Hutchins v. Wilentz, Goldman & Spitzer, 253 F.3d 176, 183 (3rd Cir. 2001) (citations omitted). "Testimony before Congress |*71| painted a sordid picture of how the United |**31| States had been billed for nonexistent or worthless goods, charged exorbitant prices for goods delivered, and generally robbed in purchasing the necessities of war." Id. What became known as the "Lincoln Law," HN26 the FCA is a unique statute in that, in addition to it allowing the government to bring a civil action against an alleged false claimant, the FCA also contains a qui tam provision. n11 Vermont Agency, 529 U.S. at 768-70, 146 L. Ed. 2d 836, 120 S. Ct. 1858. A qui tam action provides that an individual (known as a relator) may bring a cause of action both on that person's behalf and on behalf of the government, thereby allowing the relator to share a portion of the proceeds derived from the recovery in a case. Id. In response to concerns that alleged false claimants were taking adverse employment actions against employees who had made allegations of fraudulent conduct related to the misuse of government funds, Congress amended the FCA in 1986 and added to the Act Section 3730(h), which is known as the whistleblower provision. United States ex rel. Yesudian v. Howard Univ., 332 U.S. App. D.C. 56, 153 F.3d 731, 736 (D.C. Cir. 1998). Section 3730(h) provides that: |**32|

HN27 any employee who is discharged, demoted, suspended, threatened, harassed, or in any manner discriminated against in the terms and conditions of employment because of lawful acts done by the employee ... in furtherance of an action under this section, including investigation for, initiation of, testimony for, or assistance in an action filed or to be filed under this section, shall be entitled to all relief necessary to make the employee whole ..."[11] |**33|

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[11]Qui tam is short for the Latin phrase qui tam pro domino rege quam pro se ipso in hac parte sequitur. Vermont Agency of Natural Res. v. United States ex rel. Stevens, 529 U.S. 765, 769, 146 L. Ed. 2d 836, 120 S. Ct. 1858 n.1. This English translation of this phrase means he "who pursues

HN28 31 U.S.C. § 3730(h). The District of Columbia Circuit has stated that to make out a successful claim of retaliation under Section 3730(h), a plaintiff must demonstrate:

> (1) he engaged in protected activity, that is, 'acts done ... in furtherance of an action under this section'; and (2) he was discriminated against 'because of' that activity. To establish the second element, the employee must in turn make two further showings. The employee must show that: (a) 'the employer had knowledge the employee was engaged in protected activity'; and (b) 'the retaliation was motivated, at least in part, by the employee's engaging in [that] protected activity.'

Yesudian, 153 F.3d at 736 (quoting S. Rep. No. 99-345, at 35, reprinted in 1986 U.S.C.C.A.N. at 5300).

In the instant case, the plaintiff asserts that he "reported to his superiors in Sibley's Washington, D.C. office numerous illegal uses of United States government funds, equipment and materials by individual employees of Sibley International in Georgia ... [and] was specifically asked by Sibley officials to 'keep it quiet' until the contract with USAID was renewed." [**34] Pl.'s Opp'n at 26. The plaintiff's contract was subsequently not renewed once the defendant's contract with USAID was renewed. Id. This Court has subject-matter jurisdiction to entertain the plaintiff's FCA claim because the plaintiff's allegations,

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this action on our Lord the King's behalf as well as his own." Id. There are three other qui tam statutes that remain in the United States Code: 25 U.S.C. § 81 (cause of action and share of recovery against a person contracting with Indians in an unlawful manner); 25 U.S.C. § 201 (cause of action and share of recovery against a person violating Indian protection laws); 35 U.S.C. § 292(b) (cause of action and share of recovery against a person falsely marking patented articles). Id.

[*72] if proven true, demonstrate that the crux of the inappropriate conduct occurred within the United States. As the nature of the protection offered by the whistleblower provision of the FCA is to remedy retaliation for a false claims disclosure, it is noteworthy that the plaintiff allegedly notified Sibley's officials in Washington, D.C. of the fraudulent misappropriation of United States government funds by its' employees in the Republic of Georgia, the officials informed him to "keep it quite", and he was subsequently terminated when his contract with the defendant was not renewed.[12] See 31 U.S.C. § 3729(a) (2000).[13] This conduct regarding the plaintiff's FCA claim is

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[12] The termination of the plaintiff's employment appears to have been initiated in the United States, as evidenced by the termination letter from the defendant's Chief Financial Officer who works at the defendant's main office in Washington, D.C. See Compl. Ex. D.

[13] HN29 31 U.S.C. § 3729(a) states that an individual is liable under the FCA for committing the following acts:

(1) knowingly presents, or causes to be presented, to an officer or employee of the United States Government or a member of the Armed Forces of the United States a false or fraudulent claim for payment or approval;
(2) knowingly makes, uses, or causes to be made or used, a false record or statement to get a false or fraudulent claim paid or approved by the Government;
(3) conspires to defraud the Government by getting a false or fraudulent claim allowed or paid;
(4) has possession, custody, or control of property or money used, or to be used, by the Government and, intending to defraud the Government or willfully to conceal the property, delivers, or causes to be delivered, less property than the amount for which the person receives a certificate or receipt;
(5) authorized to make or deliver a document certifying receipt of property used, or to be used, by the Government and, intending to defraud the Government, makes or delivers the receipt without completely knowing that the information on the receipt is true;
(6) knowingly buys, or receives as a pledge of an obligation or debt, public property from an officer or employee of the Government, or a member of the Armed Forces, who lawfully may not sell or pledge the property; or
(7) knowingly makes, uses, or causes to be made or used, a false record or statement to conceal, avoid, or decrease an obligation to pay or transmit money or property to the Government.

distinguishable from the conduct complained about in the plaintiff's Title VII claim because the genesis of the FCA whistleblower claim is the disclosure of the misappropriation of government funds and the subsequent retaliation for such [**35] disclosure, conduct that occurred within the United States, whereas the plaintiff's Title VII claim involves discrimination at the workplace, conduct that occurred abroad.[14] Therefore, because the Court finds that it has subject-matter jurisdiction [*73] to entertain the plaintiff's FCA claim, it will examine the adequacy of the plaintiff's FCA allegation because the defendant asserts that the plaintiff "has not alleged any facts which even suggest that Sibley submitted a false claim to the government ...", Def.'s Mot. at 8, and has therefore failed to state a claim upon which relief can be granted pursuant to Federal Rule of Civil

[14] Although it appears to the Court that the whistleblower provision of the FCA may not apply to aliens and fraudulent conduct that occurs abroad, this issue is not before the Court because the conduct at issue in the plaintiff's FCA allegation occurred within the United States. As the Court discussed above in reference to Title VII, HN30 courts must only construe a statute's scope to extend domestically, unless there is clear language by Congress in the statute to extend the statute's protections abroad. See Arabian Am. Oil, 499 U.S. at 248; Foley Bros., 336 U.S. at 284-85; Benz, 353 U.S. at 147; but see, United States ex rel. Thistlethwaite v. Dowty Woodville Polymer, Ltd., 110 F.3d 861 (2d Cir. 1997) (Second Circuit held that district court had subject-matter jurisdiction in qui tam FCA suit involving British plaintiffs and a British defendant company, which had a number of contracts with a contractor to the United States Air Force. The Second Circuit held that Section 3732(a) ("False claims jurisdiction") is a venue statute and found "no basis in the evolution of § 3732(a) or in the legislative history of its enactment for reading into that section a limitation on the district court's subject matter jurisdiction.")). Id. at 868.

Procedure 12(b)(6).[15] [**37]

(1) Adequacy of the False Claim Act Allegations in the Plaintiff's Complaint

HN32 To sufficiently plead a whistleblower retaliation claim under the FCA, the plaintiff must assert that he was engaged in "protected activity" either by alleging that he investigated false or fraudulent claims made by the defendant to USAID or by alleging that he reported such claims to the defendant or USAID. 31 U.S.C. § 3730(h); Yesudian, 153 F.3d at 737. HN33 The District of Columbia Circuit has stated that an allegation brought under the FCA must satisfy the requirements of Federal Rule of Civil Procedure 9(b). Totten, 286 F.3d at 544, 551-52. HN34 Rule 9(b) mandates that fraud [**38] claims be pled with particularity, and the rule was designed to discourage meritless fraud accusations, to prevent serious damage to the reputation of the defending party from baseless claims, and to deter claimants from adding broad fraud allegations to induce advantageous settlements. Firestone v. Firestone, 316 U.S. App. D.C. 152, 76 F.3d 1205, 1211 (D.C. Cir. 1996); Shields v. Washington Bancorp., 1992 U.S. Dist. LEXIS 4177, 1992 WL 88004, at *4 (D.D.C. Apr. 7, 1992). The specific allegations required under Rule 9(b) may differ depending on the facts of each case, however, a claimant must typically allege the identity of the person who made the fraudulent statement, the time, place and content of the misrepresentation, the resulting injury, and the method by which the misrepresentation was communicated. Totten, 286 F.3d at 552; Firestone, 76 F.3d at 1211; Kowal, 16 F.3d at 1278. Conclusory allegations that a

[15] Moreover, this Court finds that it is an appropriate venue pursuant to HN35 31 U.S.C. § 3732(a), which states that "any action under section 3730 may be brought in any judicial district in which the defendant or, in the case of multiple defendants, any one defendant can be found, resides, transacts business, or in which any act proscribed by section 3729 occurred."

defendant's actions were fraudulent and deceptive are not sufficient to satisfy Rule 9(b). Shields, 1992 U.S. Dist. LEXIS 4177, 1992 WL 88004, at *4; Greenstone v. Cambex Corp., 975 F.2d 22, 25 (1st Cir. 1992). |**39|

The plaintiff's pro se Complaint, even when held to a less stringent standard than those pleadings drafted by attorneys, fails to satisfy the requirements of Rule 9(b). While the plaintiff alleges that he reported his immediate supervisor's alleged misuse of USAID funds to the defendant, Compl. P 68, he fails to allege the time, place and nature of the misuse, the resulting injury, or the method by which false claims were made with any particularity. However, in the Plaintiff's Opposition to the Defendant's Motion to Dismiss, he does now, with the assistance of counsel, meet the specific pleading requirements with regards to his FCA claim. Pl.'s Opp'n at 28-32. HN35 While it is generally understood that the complaint may not be amended by legal memoranda that are submitted as oppositions to motions for dismissal or summary judgment, Car Carriers, Inc. v. Ford Motor Co., 745 F.2d 1101, 1107 (7th Cir. 1984), courts have allowed, for Rule 9(b) purposes, a party to supplement its complaint through such legal memoranda or to amend its complaint for the sake of judicial economy. |*74|

HN36 Those courts that have allowed a party to supplement a fraud allegation in the complaint with |**40| legal memoranda rely on the rationale of judicial economy. For example, in Bonilla v. Trebol Motors Corp., 150 F.3d 77, 81 (1st Cir. 1998), the First Circuit treated the plaintiff's summary judgment opposition and related discovery material provided by the plaintiff, which gave sufficient notice of fraudulent acts, as a de facto amendment to the fraud allegation in the complaint. The court noted that this was a "special circumstance[] and only for Rule 9(b) purposes" and found that "[a] remand at this stage to allow an amendment to the complaint to restate this information

would be silly." Id. Furthermore, in Elias Brothers Restaurants, Inc. v. Acorn Enterprises, Inc., 831 F. Supp. 920, 922 n.3 (D. Mass. 1993), the court found that rather than granting leave to amend the complaint, an affidavit submitted in opposition to a summary judgment motion should be considered a supplement to the fraud allegation in the complaint. Similarly, the court in Buccino v. Continental Assurance Co., 578 F. Supp. 1518 (S.D.N.Y. 1983), denied the defendant's motion to dismiss a fraud claim finding that specific fraud allegations were "supplied [**41] by the documentary, affidavit and deposition evidence produced in connection with [the summary judgment] motion." Id. at 1524 n.5. These courts have concluded that allowing such amendments was fair because, given the allegations contained in the plaintiffs' legal memoranda, the defendants had adequate notice of the specifics of the fraud claims. Bonilla, 150 F.3d at 81; Elias Bros. Rests., 831 F. Supp. at 922 n.3; Cont'l Assurance, 578 F. Supp. at 1524 n.5.[16]

HN37 Federal Rule of Civil Procedure 15(a) states that leave to amend pleadings shall be freely given when required by justice. Firestone, 76 F.3d at 1209. [**42] The District of Columbia Circuit has stated that "leave to amend is 'almost always' allowed to cure deficiencies in pleading fraud." Id. (quoting Luce v. Edelstein, 802 F.2d 49, 56 (2d Cir. 1986) (quoting 2A J. Moore & J. Lucas, Moore's Federal Practice, P 9.03 at 9-34 (2d ed. 1986))). And in Shields, 1992 U.S. Dist. LEXIS 4177, 1992 WL 88004, at *4, another judge of this Court recognized that "the trend in most courts is to permit plaintiff an opportunity to amend, as required by the liberal policy permitting amendments under Rule 15." Moreover, in Wallace v. Abramson, 1998 WL 63065, at *3

[16] While the Court recognizes that the posture of Bonilla, Elias Bros. Rests., and Cont'l Assurance when they were before the courts were on motions for summary judgment, the Court does not discern any meaningful reason why a different result is called for when a Rule 9(b) challenge is raised solely in a motion to dismiss.

(D.D.C. June 7, 1988), the court permitted the plaintiff to amend his complaint to satisfy Rule 9(b), finding that there was no "undue delay, bad faith or dilatory motive ..., repeated failure to cure deficiencies ..., undue prejudice to the opposing party ..., [or] futility of the amendment." In his opposition to plaintiff's dismissal motion, the plaintiff provides specific details regarding both his immediate supervisor's alleged fraudulent use of USAID resources and improper conduct between Sibley and private business interests, both of which allegedly defrauded **[**43]** the United States government. Pl.'s Opp'n at 28-32. Specifically, the plaintiff asserts twenty-two allegations of fraud, including, among other things, the following: that the defendant improperly used USAID funds to generate and perform private business; that the plaintiff's immediate supervisor used USAID project staff during business hours and USAID resources to perform private business matters, such as house renovations, the purchase of personal **[*75]** items and natural gas; that, at the expense of USAID and for personal reasons, Mr. Reynolds relocated the project offices to more expensive but substandard offices; and, that subcontractor contracts were pre-selected in violation of USAID regulations. Pl.'s Opp'n at 28-32. Such allegations of fraud certainly comport with the specificity requirements of Federal Rule of Civil Procedure 9(b).

Therefore, because of these additional allegations, the Court is unable to "say with assurance that ... it appears 'beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief.'" Haines, 404 U.S. at 520-21. Accordingly, dismissal of the plaintiff's pro se FCA claim is inappropriate **[**44]** because the Court finds that the plaintiff's opposition to the motion to dismiss adequately complies with the pleading requirements of Rule 9(b), and the defendant is now clearly on notice of the

particulars of the FCA claim.[17] The Court determines that justice requires that the plaintiff be afforded the opportunity to file an amended complaint because judicial economy is advanced by refusing to dismiss the FCA claim since it is inevitable that counsel would argue that plaintiff should be permitted to refile the FCA claim because a pro se complaint should not suffer the harsh consequence of dismissal solely due to the plaintiff's ignorance of the unique pleading requirements applicable to an FCA claim. Therefore, the Court will deny the defendant's motion to dismiss in order to allow plaintiff's counsel the opportunity to file an amended complaint.[18] **[**45]**

(D) State Law Claims

HN38 When a federal court has an independent basis for exercising federal jurisdiction, the court may also exercise supplemental jurisdiction over "claims that are so related to claims in the action within original jurisdiction that they form part of the same case or controversy under Article III of the United States Constitution." 28 U.S.C. § 1367(a) (2001); Women Prisoners of D.C. Dep't of Corr., 320 U.S. App. D.C. 247, 93 F.3d 910, 920 (D.C. Cir. 1996). To be adequately related, the federal and state claims must "derive from a common nucleus of operative fact ... [and] are such that [a plaintiff] would ordinarily be expected to try them all in one judicial proceeding." United Mine Workers of Am. v. Gibbs, 383 U.S. 715, 725, 16 L. Ed. 2d 218, 86 S. Ct. 1130 (1966). The plaintiff's federal whistleblower retaliation claim under

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[17] It appears that the defendant may have been on notice of the particulars of the FCA allegations prior to the filing of the complaint. The plaintiff asserts that he sent the defendant a letter seven days prior to initiating suit, specifically "detailing the facts and the legal basis of each claim ..." Pl.'s Opp'n at 27.

[18] If an amended complaint is not filed within fifteen (15) days from the date of the issuance of this Order, defendant can renew its motion to dismiss the fraud claim.

the FCA [**46] and his state statutory claims "derive from a common nucleus of operative fact," namely, the circumstances surrounding Mr. Shekoyan's employment termination. Therefore, the Court can exercise supplemental jurisdiction over the state claims pursuant to 28 U.S.C. § 1367. HN39 While federal courts have the discretion to decline to exercise jurisdiction over state claims, the Court concludes that "'considerations of judicial economy, convenience, and fairness to litigants'" favor the several claims being litigated in a single proceeding. Carnegie-Mellon Univ. v. Cohill, 484 U.S. 343, 349, 98 L. Ed. 2d 720, 108 S. Ct. 614 (1988) (citations omitted). Thus, the defendant's motion [*76] to dismiss the plaintiff's state law claims on the ground that the Court lacks subject matter jurisdiction over those claims is denied.

IV. Conclusion

For the reasons set forth above, this Court must grant the defendant's motion to dismiss the plaintiff's Title VII claim because he is an alien employed extraterritorially, and his Executive Order 11,246 claim because the executive order does not provide for a private right of action. However, the defendant's motion to dismiss [**47] the plaintiff's FCA claim must be denied because the plaintiff's allegations as now set forth in his opposition to the defendant's motion to dismiss comply with the pleading requirements of Rule 9(b). Finally, the plaintiff's state law claims also survive the defendant's dismissal challenge because this Court finds it legally proper to exercise supplemental jurisdiction over these claims pursuant to 28 U.S.C. § 1367.[19]

SO ORDERED this 16th day of August, 2002.

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[19] An Order consistent with the Court's ruling accompanies this Memorandum Opinion.

REGGIE B. WALTON

UNITED STATES DISTRICT JUDGE

ORDER

For the reasons set forth in the Memorandum Opinion accompanying this Order, Defendant's Motion to Dismiss is granted in part and denied in part. Therefore it is,

ORDERED that Defendant's Motion to Dismiss the plaintiff's Title VII and Executive Order 11,246 claims is GRANTED; and it is

FURTHER ORDERED that Defendant's Motion to Dismiss the plaintiff's False Claim Act, **[**48]** District of Columbia Human Rights Act, breach of contract, defamation, and intentional infliction of emotional distress claims is DENIED; and it is

FURTHER ORDERED that the plaintiff shall file an amended Complaint that conforms to the requirements of Federal Rule of Civil Procedure 9(b) within fifteen (15) days of the entry of this Order.

SO ORDERED this 16th day of August, 2002.

REGGIE B. WALTON

UNITED STATES DISTRICT JUDGE

File Date: August 19, 2002

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

VLADIMIR SHEKOYAN,
Plaintiff,

v. Civil Action No. 00-2519 (RBW)

SIBLEY INTERNATIONAL CORP.,
Defendant.

ORDER

This matter comes before the Court on the Plaintiff's Motion to Amend August 16, 2002 Order to Restore Plaintiff's Title VII Claim, In Light of Evidence Produced During Discovery and Current Case Law, filed on July 22, 2003. The plaintiff seeks reconsideration pursuant to Federal Rules of Civil Procedure 60(b)(2), 60(b)(3) and 60(b)(6) of the Court's Memorandum Opinion and Order dismissing the plaintiff's claim that the defendant discriminated against him based on his national origin in violation of Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000(e) et seq. (2000) ("Title VII").[20] *Shekoyan v. Sibley Int'l Corp.*, 217 F. Supp. 2d 59 (D.D.C. 2002). In its Memorandum Opinion, the Court found that because the "plaintiff is a permanent resident

[20]While it does not appear that the plaintiff is seeking reconsideration of the Court's dismissal of his claim ofdiscrimination on the basis of national origin in violation of Presidential Executive Order 11,246, Exec. Order No. 11, 246, 30 Fed. Reg. 12,319 (Sept. 24, 1965), to the extent reconsideration is being requested, the request is denied because the plaintiff has failed to demonstrate how the executive order creates a private cause of action, as this Court discussed in its Memorandum Opinion. *Shekoyan v. Sibley Int'l Corp.*, 217 F. Sup p. 2d 59, 69-70 (D.D.C. 2002).

alien, who was employed extraterritorially, he is outside the scope of the protections of Title VII." *Id.* at 68-69. The plaintiff has now filed a forty-five page motion for reconsideration in which he is seeking reinstatement of his Title VII claim based upon: (1) evidence he discovered during discovery that the defendant considered him an "expatriate" and (2) the decision of *Torrico v. IBM,* 213 F. Supp. 2d 390 (S.D.N.Y. 2002). Upon consideration of the plaintiff's motion, and for the following reasons, the Court will deny the plaintiff's motion for reconsideration.

The Court began its analysis of the plaintiff's Title VII claim in its Memorandum Opinion by providing a historical overview of the extraterritorial scope of Title VII, noting that in 1991 Title VII was specifically amended by Congress to give it a limited extraterritorial reach. As this Court explained:

> First, the amended Act expands Title VII's definition of 'employee' to include United States citizens employed abroad. 42 U.S.C. § 2000e(f) ('With respect to employment in a foreign county, [the] term [employee] includes an individual who is a citizen of the United States.'). Second, Congress explicitly precluded Title VII's extraterritorial scope from covering aliens. 42 U.S.C. § 2000e-1 ('This subchapter shall not apply to an employer with respect to the employment of aliens outside any State....'). Finally, this amended language extended Title VII abroad only to corporations controlled by United States employers. 42 U.S.C. § 2000e-1(c).

Shekoyan, 217 F. Supp. 2d at 65 (footnote omitted). Notably, the Court went on to observe that "[w]hile Congress certainly 'has the authority to enforce its laws beyond the

territorial boundaries of the United States', there must be evidence of its intent to do so in the plain language of the statute." *Id.* (quoting *EEOC v. Arabian Am. Oil Co.*, 499 U.S. 244, 248 (1991) (citing *Foley Bros., Inc. v. Filardo*, 336 U.S. 281, 284-85 (1949); *Benz v. Compania Naviera Hidalgo, S.A.*, 353 U.S. 138, 147 (1957))). The Court further stated that

> [b]ecause statutory language represents the clearest indication of Congressional intent,... [this Court] must presume that Congress meant precisely what it said. Extremely strong, this presumption is rebuttable only in the "rare cases [in which] the literal application of a statute will produce a result demonstrably at odds with the intentions of its drafters.'

Id. (quoting *NPR v. FCC*, 254 F.3d 226, 230 (D.C. Cir. 2001) (quoting *United States v. Ron Pair Enterp., Inc.*, 489 U.S. 235, 242 (1989), and citing *Qi-Zhuo v. Meissner*, 70 F.3d 136, 140 (D.C. Cir. 1995) ("Where... the plain language of the statute is clear, the court generally will not inquire further into its meaning."))). With this in mind, the Court concluded that

> [a]n examination of the plain language of the Civil Rights Act of 1991 demonstrates that *Title VII will only apply extraterritorially to United States citizens*. Title VII's definition of 'employee' was specifically amended to reflect that '[w]ith respect to employment in a foreign county, such term [employee] includes an individual who is a citizen of the United States.' 42 U.S.C. § 2000e(f). If Congress had intended to extend Title VII's scope to protect non-United States citizens

> working abroad for American controlled companies, it could very well have included such individuals in its definition of employee.

Id. (citing *Iwata v. Stryker Corp.*, 59 F. Supp. 2d 600, 604 (N.D. Tex. 1999) (holding that if Congress intended for Title VII to extend to foreign nationals working outside of the United States, it had the opportunity to do so)) (emphasis added).

The plaintiff has now provided additional evidence in his motion for reconsideration concerning his immigration status and the location of his employment for Title VII purposes. The Court will address each subject separately.

(1) Title VII's Extraterritorial Scope Only Extends to United States Citizens

The Court's conclusion in its Memorandum Opinion was clear, "[a]lthough the plaintiff claims that he is a United States national,... Title VII will only have an extraterritorial application when: (1) the employee is a United States citizen and (2) the employee's company is controlled by an American employer." *Id.* Here, it is undisputed that the plaintiff was not a United States citizen during the course of his employment with the defendant.[21] In fact, it is clear that

[21]The plaintiff also makes the assertion that he is a United States diplomat and that because of such status, he was employed on United States soil during the course of his employment in the Republic of Georgia. Plaintiff's Motion to Amend August 16, 2002 Order to Restore Plaintiff's Title VII Claim, In Light of Evidence Produced During Discovery and Current Case Law at 14-15. Aside from the perplexing nature of this argument, there is absolutely no evidence in the record that the plaintiff was a United States diplomat during the course of his employment with the defendant. While the plaintiff has submitted a cop y of a "Service Card," which apparently grants him certain privileges and immunities by the Republic of Georgia, this in no way is evidence that he was a diplomat of the United States.

he was a permanent legal resident of the United States during this time period and applied for citizenship only following the termination of his employment. *See* Plaintiff's Statement of Undisputed Material Facts ("Pl.'s Facts") ¶ 2. Realizing that his immigration status is potentially a bar to bringing a Title VII claim, the plaintiff maintains that he is a non-citizen United States national and that nationals are subject to Title VII's protections when employed outside of the United States by corporations controlled by United States employers. The Court does not agree. As this Court noted earlier:

> An examination of the plain language of the Civil Rights Act of 1991 demonstrates that *Title VII will only apply extraterritorially to United States citizens.* Title VII's definition of 'employee' was specifically amended to reflect that '[w]ith respect to employment in a foreign county, such term [employee] includes an individual who is a citizen of the United States.' 42 U.S.C. § 2000e(f). If Congress had intended to extend Title VII's scope to protect non-United States citizens working abroad for American controlled companies, it could very well have included such individuals in its definition of employee.

Shekoyan, 217 F. Supp. 2d at 65-66 (citing *Iwata*, 59 F. Supp. 2d at 604 (holding that if Congress intended for Title VII to extend to foreign nationals working outside of the United States, it had the opportunity to do so)) (emphasis added). Accordingly, because Congress specifically amended Title VII's extraterritorial scope to apply only to "an individual who is a citizen of the United States[,]" 42 U.S.C. § 2000e(f), the Court must conclude, consistent with

the well established principle of statutory interpretation discussed above – if Congress intended for the extraterritorial scope of Title VII not to extend to non-United States citizens, including nationals working for United States controlled corporations abroad, it would have specifically said so. The defendant cites several statutes as examples of the proposition that Congress knows how to extend the applicability of a statute to non-United States citizens when it wants to. Opposition to Plaintiff's Motion to Amend August 16, 2002 Order to Restore Plaintiff's Title VII Claim ("Opp'n") at 3 n.3 (citing the Arms Export Control Act, 22 U.S.C. § 2755, 26 U.S.C. § 7701(a)(30)(A), which prohibits discrimination against any United States person and defines such individuals as "a citizen or resident of the United States," and the Government Organization and Employees Act, 5 U.S.C. § 5561, which defines employees as "an employee in or under an agency who is a citizen or national of the United States or an alien admitted to the United States for permanent residence...."). The Court finds it notable that, in addition to the cases that the Court relied upon in its Memorandum Opinion, even the principal case relied upon by the plaintiff in his motion for reconsideration also recognizes that Title VII's extraterritorial scope does not extend to non-United States citizens. Thus, in *Torrico*, the court stated that "it is clear that [the 1991 amendments to Title VII] distinguish between U.S. citizens working abroad for U.S. employers, who are protected from discrimination, and non-U.S. citizens working abroad for those same employers, who fall outside the statutory protections against discrimination." 213 F. Supp. 2d at 399.

Finally, it is again important to discuss the plaintiff's immigration status. In its Memorandum Opinion, upon concluding that Title VII's scope only extends to United States citizens, the Court addressed the plaintiff's contention that he was a non-citizen United States national. *Shekoyan*, 217 F. Supp. 2d at 66-67. The Court concluded that on the

record before it, the plaintiff had failed to offer any proof indicating that he "owes permanent allegiance to the United States." *Id.* (quoting 8 U.S.C. § 1101(a)(22)). Therefore, in an effort to resolve this case on the most narrow grounds as possible, the Court stated in a footnote that "[b]ecause the plaintiff is an alien, the Court need not address the issue of Title VII's applicability to non-citizen United States nationals who are employed abroad." *Id.* at 66 n.7. The plaintiff now comes forward with additional evidence which he asserts demonstrates that he was a non-citizen United States national during the course of his employment at issue in this case. While the Court acknowledges that some of this newly submitted evidence may raise a colorable claim that the plaintiff "owe[d] permanent allegiance to the United States" during the course of his employment with the defendant, *see* 8 U.S.C. § 1101(a)(22), this showing is of no moment, as Title VII's extraterritorial scope only extends to United States citizens. To accept the plaintiff's position that this Court should extend Title VII's protections to United States nationals, despite the congressional limitation of its 1991 amendment, would amount to nothing less than judicial legislating. This, the Court cannot constitutionally do.

(2) The Location of the Plaintiff's Employment for Title VII Purposes

While the Court stands firm on its conclusion that Title VII's extraterritorial scope only applies to United States citizens, the plaintiff still may be able to assert a claim under Title VII if the location of his employment for Title VII purposes can be considered as having been within the United States. *See Espinoza v. Farah Mfg. Co.*, 414 U.S. 86, 95 (1973) (holding that Title VII covers aliens employed in the United States). Noting that the determination of the plaintiff's location of employment focuses on his primary workstation, this Court concluded that since the plaintiff performed his services in the Republic of Georgia throughout the tenure of his employment with the defendant, which was evidenced by the fact that he was specifically hired to work there and performed his primary work related duties there, his location of employment for Title VII purposes was in the Republic of Georgia. *Shekoyan*, 217 F. Supp. 2d at 68-69. The plaintiff now asserts that if the Court conducts the analysis employed by the court in Torrico, it will reach the conclusion that the plaintiff was employed in the United States. The Court disagrees.

In *Torrico*, a case involving the Americans with Disabilities Act, 42 U.S.C. § 12,101 *et seq.*, the court focused on the "'center of gravity' of the entire employment relationship" in determining the location of the plaintiff's employment. 213 F. Supp. 2d at 403-04. The court stated:

> The center of gravity of an individual's relationship with an employer is determined by considering a variety of factors, including (but not limited to) whether any employment relationship had, in fact, been created at the time of the alleged discrimination, and if so, where that employment relationship was

> created and the terms of employment were negotiated; the intent of the parties concerning the place of employment; the actual or contemplated duties, benefits, and reporting relationships for the position at issue; the particular locations in which the plaintiff performed those employment duties and received those benefits; the relative duration of the employee's assignments in various locations; the parties' domiciles; and the place where the allegedly discriminatory conduct took place. The list is not meant to be exhaustive; the center of gravity of the parties' relationship is to be determined based on the totality of circumstances.

Id. In this case, the Court finds it particularly persuasive that the plaintiff was specifically recruited by the defendant to work in the Republic of Georgia, that the Republic of Georgia was the location where the plaintiff almost exclusively performed his employment duties during his tenure with the defendant,[22] and the alleged discrimination occurred also in the Republic of Georgia. See Complaint ("Compl.") ¶¶ 5, 21-67, Exhibit ("Ex.") C. This case is therefore markedly different from the circumstances in *Torrico*. There, the plaintiff had been

> employed by [the defendant] in the United States for some period of time before being assigned to duty in Chile... [and had] allege[d] that [the defendant] temporarily assigned him to work in Chile not to take on a new set of responsibilities, but simply to facilitate the

[22]The Court uses the words "almost exclusively" because there is a suggestion in the record that the plaintiff worked for three or four days in the United States during the holiday season in January 1999. Declaration of Vladimir Shekoyan ¶ 25.

> more effective performance of his existing, New York-based duties.

Torrico, 213 F. Supp. 2d at 404. Furthermore, the plaintiff "allege[d] as well that the agreement governing the assignment specifically anticipated that upon its conclusion, he would return to duties in the United States . . . ." *Id.* The *Torrico* Court found it significant that

> [u]nlike the majority of cases cited by [the defendant], in which the overseas employment involved the creation of a new employment relationship, lacking any substantial preexisting contacts with the employer in the United States, [the plaintiff] here alleges that no new employment relationship was in fact created by [his] [t]emporary [a]ssignment, which maintained most, if not all, of [the plaintiff's] preexisting U.S. contacts.

Id. at 405 (internal citations omitted). Here, the Court finds it notable that unlike in *Torrico*, it is clear that there was not a "substantial preexisting contact" between the plaintiff and his employer, as the plaintiff was hired in January 1998 by the defendant to specifically work for a twenty-one month period in the Republic of Georgia. Compl. ¶¶ 10, 20, Ex. C. Equally important is the absence of any evidence in the record suggesting that the defendant anticipated that the plaintiff would return to the United States following the twenty-one month period in the Republic of Georgia and then continue working for the defendant here. Thus, employing *Torrico's* "center of gravity" analysis does not lead to a result different than already reached by this Court.

In conclusion, for the aforementioned reasons, and for all of the reasons expressed in its August 16, 2002

Memorandum Opinion, this Court must again conclude that because the plaintiff was a non-United States citizen employed abroad during the course of his employment with the defendant, he is not subject to the protections afforded by Title VII. Accordingly, it is hereby this 26th day of January, 2004

ORDERED that the Plaintiff's Motion to Amend August 16, 2002 Order to Restore Plaintiff's Title VII Claim, In Light of Evidence Produced During Discovery and Current Case Law is **DENIED**.

SO ORDERED.

REGGIE B. WALTON
UNITED STATES DISTRICT JUDGE

VLADIMIR SHEKOYAN, Plaintiff,
v.
SIBLEY INTERNATIONAL CORP., Defendant.

Civil Action No. 00-2519 (RBW)

UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA

309 F. Supp. 2d 9; 2004 U.S. Dist. LEXIS 4845

March 19, 2004, Decided

SUBSEQUENT HISTORY: Affirmed by Shekoyan v. Sibley Int'l, 2005 U.S. App. LEXIS 10174 (D.C. Cir., June 3, 2005)

PRIOR HISTORY: **Shekoyan v. Sibley Int'l Corp., 217 F. Supp. 2d 59, 2002 U.S. Dist. LEXIS 15839 (D.D.C., 2002)**

DISPOSITION: Defendant's motion for summary judgment granted. Claim dismissed.

COUNSEL: [**1] VLADIMIR SHEKOYAN, Plaintiff - Counter Defendant, Pro se, Washington, DC.

For VLADIMIR SHEKOYAN, Plaintiff - Counter Defendant: Dawn V. Martin, Washington, DC.

For SIBLEY INTERNATIONAL, Defendant: Eric A. Dubelier, Laura Jean Oberbroeckling, REED SMITH, Washington, DC.

For SIBLEY INTERNATIONAL, Counter Claimant: Laura Jean Oberbroeckling, REED SMITH, Washington, DC.

JUDGES: REGGIE B. WALTON, UNITED STATES

DISTRICT JUDGE.
OPINIONBY: REGGIE B. WALTON

OPINION: [*11] MEMORANDUM OPINION

This matter comes before the Court upon defendant Sibley International Corporation's ("Sibley") Motion for Summary Judgment ("Def.'s Mot."), following the issuance of this Court's August 16, 2002 Memorandum Opinion and Order dismissing the plaintiff's claims of discrimination on the basis of national origin in violation of Title VII of the Civil Rights Act of 1964, 42 U.S.C. §§ 2000(e), et seq. (2000), and discrimination on the basis of national origin in violation of Presidential Executive Order ("E.O.") 11,246, Exec. Order No. 11,246, 30 Fed. Reg. 12,319 (Sept. 24, 1965). **Shekoyan v. Sibley Int'l Corp., 217 F. Supp. 2d 59 (D.D.C. 2002)**. The [**2] defendant now seeks summary judgment on the plaintiff's remaining claims of retaliatory termination of his employment in violation of the whistleblower provision of the False Claims Act ("FCA"), 31 U.S.C. § 3730(h) (2000), discrimination on the basis of national origin in violation of the District of Columbia Human Rights Act ("DCHRA"), D.C. Code §§ 2-1401.01-1403.17 (2001), and District of Columbia common law claims of breach of contract, defamation, and intentional infliction of emotional distress. n1 Upon consideration of the parties' submissions and for the reasons set forth below, the Court will grant the defendant summary judgment on the plaintiff's FCA claim and will dismiss the parties' District of Columbia claims pursuant to 28 U.S.C. § 1367.[1] [**3]

I. Background

[1] The Court notes that the defendant has filed an Answer and Counterclaim to First Amended Complaint, in which it has asserted a claim of conversion and trespass to chattels against the plaintiff. See Answer and Counterclaim to First Amended Complaint at 11-12. However, the defendant has not requested summary judgment in its favor on these counterclaims.

The plaintiff was born in Armenia and immigrated to the United States in 1994. Plaintiff's Statement of Undisputed Material Facts ("Pl.'s Facts") P 1. In September 1997, the United States Agency for International Development ("USAID") awarded defendant Sibley International Corporation ("Sibley"), which is incorporated in Delaware and headquartered in the District of Columbia, "the task order for the Georgia Enterprise Accounting Reform ("GEAR") project[.]" Statement of Material Facts Not in Dispute ("Def.'s Facts") PP 1, 4. The defendant states that "the purpose of the GEAR project, in general, was to assist with the transition from command to market accounting in the Republic of Georgia and develop enterprise market economy accounting and auditing practices in the Republic of Georgia." Id. P 5. On January 26, 1998, the parties signed an employment contract and the plaintiff was hired as a "Senior Training Advisor" for the GEAR project. Pl.'s Facts P 4. While the employment contract clearly indicates that the plaintiff's employment "will be for a period of twenty-one months beginning approximately January 26, 1998 and ending October 31, 1999" and that **[**4]** Sibley "believed [the GEAR project] will be extended for an additional period of time[,]" Def.'s Facts, Exhibit ("Ex.") 6, the plaintiff asserts that Donna Sibley, the President of Sibley, "conveyed and anticipated that plaintiff's employment with Sibley [would] extend beyond the 21 months of the GEAR Project Task Order." Pl.'s Facts P 6. In February of 1998, the plaintiff went to the Republic of Georgia to perform his job duties pursuant to the **[*12]** agreement. Id. P 18. In June of 1999, Jack Reynolds became employed by Sibley as "Chief of Party" of the GEAR Project in the Republic of Georgia. Id. P 52. The plaintiff asserts that Reynolds "created a hostile work environment for [him], on the basis of his national origin, Armenian[.]" Id. P 53. Reynolds is alleged to have "repeatedly told plaintiff, and other persons at his worksite, that plaintiff was not a 'real' American" and "constantly made derogatory and racist comments about Georgian

people, as well as other people from the former Soviet Union." Id. PP 54-55. The plaintiff asserts that he repeatedly complained to Sibley's headquarters in the District of Columbia about the problems he was having with Reynolds. [**5] Id. P 68. The plaintiff states that Gary Vanderhoof, who worked at headquarters, was informed about Reynolds' behavior, including the allegation that the plaintiff was deprived of access to GEAR Project vehicles. Id. The plaintiff also states that Vanderhoof told him "to work the problems out locally with Reynolds and said that headquarters was busy getting the project extended to receive additional funding from USAID." Id. P 71.

The plaintiff also asserts that he "reported to Sibley officials in Washington, D.C.[] what he believed was the misuse of United States government funds on the GEAR Project." Id. P 72. As the Court will discuss in detail below, the plaintiff believed that USAID funds were being misused by either Sibley employees or Sibley subcontractors. Id. P 74. In October of 1999, the defendant asserts that it informed the plaintiff that his employment contract was scheduled to end on October 31, 1999. Def.'s Facts P 21. The plaintiff contends, however, that he was terminated on October 14 or 15, 1999, after "Jack Reynolds shouted at [him], berated him, ordered him to immediately vacate the premises and barred him from the premises." Pl.'s Facts [**6] P 77.

II. Standard of Review for Summary Judgment

HN1 Summary Judgment is generally appropriate when "the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." Fed. R. Civ. P. 56(c). In assessing a summary judgment motion, the Supreme Court has explained that a trial court must look to the substantive law of the claims at issue to determine whether a fact is "material," Anderson v.

Liberty Lobby, Inc., 477 U.S. 242, 248, 91 L. Ed. 2d 202, 106 S. Ct. 2505 (1986), and must treat a "genuine issue" as "one whose resolution could establish an element of a claim or defense and, therefore, affect the outcome of the action," Sanders v. Veneman, 211 F. Supp. 2d 10, 14 (D.D.C. 2002) (citing Celotex Corp. v. Catrett, 477 U.S. 317, 322, 91 L. Ed. 2d 265, 106 S. Ct. 2548 (1986); Anderson, 477 U.S. at 248).

HN2 While it is understood that when considering a motion for summary judgment a court must "draw all justifiable inferences [**7] in the nonmoving party's favor and accept the nonmoving party's evidence as true," Greene v. Amritsar Auto Servs. Co., 206 F. Supp. 2d 4, 7 (D.D.C. 2002) (citing Anderson, 477 U.S. at 255), the non-moving party must establish more than "the mere existence of a scintilla of evidence in support of the plaintiff's position," Anderson, 477 U.S. at 252. To prevail on a summary judgment motion, the moving party must demonstrate that the non-moving party "failed to make a showing sufficient to establish the existence of an element essential to that party's case, and on which that party will bear the burden of proof at trial." [*13] Celotex, 477 U.S. at 322. "Even when material facts are in dispute, however, summary adjudication may be appropriate if, with all factual inferences drawn in favor of the nonmovant, the movant would nonetheless be entitled to judgment as a matter of law." Young Dental Mfg. Co. v. Q3 Special Prods., Inc., 112 F.3d 1137, 1141 (Fed. Cir. 1997) (citing Stark v. Advanced Magnetics, Inc., 29 F.3d 1570, 1572-73 (Fed. Cir. 1994)). The District of Columbia Circuit has stated [**8] that the non-moving party may not rely solely on mere conclusory allegations. Greene v. Dalton, 334 U.S. App. D.C. 92, 164 F.3d 671, 675 (D.C. Cir. 1999); Harding v. Gray, 9 F.3d 150, 154 (D.C. Cir. 1993). Thus, "if the evidence is merely colorable . . ., or is not significantly probative . . ., summary judgment may be granted." Anderson, 477 U.S. at 249-50 (citations omitted).

III. Analysis

(A) The Plaintiff's False Claims Act "Whistleblower Provision" Claim

As this Court explained in its August 16, 2002 Memorandum Opinion, [IIN3]the FCA contains a qui tam provision,[2] which permits "an individual (known as a relator) [to] bring a cause of action both on that person's behalf and on behalf of the government, thereby allowing the relator to share a portion of the proceeds derived from the recovery in a case." **Shekoyan, 217 F. Supp. 2d at 71** (quoting Vermont Agency of Natural Res. v. United States ex rel. Stevens, 529 U.S. 765, 768-70, 146 L. Ed. 2d 836, 120 S. Ct. 1858 (2000)). Of particular significance to this case is a 1986 amendment to the FCA that was enacted by Congress "in response to concern that employees **[**9]** who exposed false claims were being punished by their companies[.]" United States ex rel. Yesudian v. Howard Univ., 332 U.S. App. D.C. 56, 153 F.3d 731, 736 (D.C. Cir. 1998). Section 3730(h) of the FCA, which is otherwise known as the whistleblower provision, provides that:

> [IIN3]any employee who is discharged, demoted, suspended, threatened, harassed, or in any manner discriminated against in the terms and conditions of employment because of lawful acts done by the employee . . . in furtherance of an action under this section, including investigation for, initiation of, testimony for, or assistance in an action filed or to be filed under this section, shall be entitled to all relief necessary to make the employee whole . . . .

31 U.S.C. § 3730(h). [IIN5]The District of Columbia Circuit

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[2] Qui tam is short for the Latin phrase qui tam pro domino rege quam pro se ipso in hac parte sequitur. Vermont Agency of Natural Res. v. United States ex rel. Stevens, 529 U.S. 765, 769 n.1, 146 L. Ed. 2d 836, 120 S. Ct. 1858 (2000). The English translation of this phrase means he "who pursues this action on our Lord the King's behalf as well as his own." Id.

has stated th[illegible] make out a successful claim of retaliation under Sectio[illegible]730(h), a plaintiff must demonstrate:

> (1) he engaged in protected activity, that is, 'acts done . . . in furtherance of an action under this section'; and (2) he was discriminated against 'because of' that activity. To establish the second element, the employee must in turn **[**10]** make two further showings. The employee must show that: (a) 'the employer had knowledge the employee was engaged in protected activity'; and (b) 'the retaliation was motivated, at least in part, by the employee's engaging in [that] protected activity.'

Yesudian, 153 F.3d at 736 (quoting S. Rep. No. 99-345, at 35, reprinted in 1986 U.S.C.C.A.N. at 5300). The defendant seeks summary judgment on the plaintiff's FCA claim because it asserts that the **[*14]** plaintiff is unable to establish any of the elements of a FCA claim. Def.'s Mot., Memorandum of Law in Support of Defendant's Motion for Summary Judgment ("Def.'s Mem.") at 16-26.

[11] (1) Was the Plaintiff Engaged in Protected Activity in Furtherance of an FCA Action?**

HN6 The Whistleblower Provision of the FCA requires that the plaintiff be engaged in protected activity "in furtherance of an action under [the FCA], including investigation for, initiation of, testimony for, or assistance in an action filed or to be filed under [the FCA]." 31 U.S.C. § 3730(h). The Yesudian Court noted that it was "Congress' intent to protect employees while they are collecting information about a possible fraud, before they have put all the pieces of the puzzle together. Indeed, it is for this reason that courts have held employees' activities protected although they have not filed qui tam suits." 153 F.3d at 740.

HN7 For a plaintiff to be engaged in protected activity, it is "sufficient that [he] be investigating matters that 'reasonably could lead' to a viable False Claims Act case[,]" id., or, in

other words, engaged in "acts which carry a 'distinct possibility' of suit under the FCA." McKenzie v. BellSouth Telecomms., Inc., 219 F.3d 508, 515 (6th Cir. 2000) (citations omitted). Of particular significance [**12] to this case, is the Sixth Circuit's statement in McKenzie that "case law indicates that 'protected activity' requires a nexus with the 'in furtherance of' prong of an FCA action." Id. (citing Yesudian, 153 F.3d at 740). The McKenzie Court commented that "the legislative history [of the FCA] states that 'protection should extend not only to actual qui tam litigants, but those who assist or testify for the litigant, as well as those who assist the Government in bringing a false claims action. Protected activity should therefore be interpreted broadly.'" McKenzie, 219 F.3d at 514 (quoting S. Rep. No. 99-345, at 35, reprinted in 1986 U.S.C.C.A.N. at 5300) (emphasis deleted). However, the Sixth Circuit was careful to point out that

> the legislative history directive to 'broadly construe' the plaintiff's 'protected activity,' however, does not eliminate the necessity that the actions be reasonably connected to the FCA, which was designed to encourage and protect federal whistleblowers. The enumerated examples of 'protected activity' in § 3730(h) -- 'investigation for, initiation of, testimony for, or assistance in an action' -- are not exhaustive; however, [**13] the 'protected activity' must relate to 'exposing fraud' or 'involvement with a false claims disclosure.'

McKenzie, 219 F.3d at 515 (citing S. Rep. No. 99-345, at 35, reprinted in 1986 U.S.C.C.A.N. at 5300).

This Court is unable to conclude that the plaintiff has "raised a genuine issue of material fact that [he was] engaged in 'protected activity,' defined as that activity which reasonably could lead to a viable FCA action." McKenzie, 219 F.3d at 516. A brief review of several cases that have confronted this

issue is a necessary predicate to addressing whether the plaintiff in this case engaged in protected activity that was "reasonably connected to the FCA." McKenzie, 219 F.3d at 515. As this Court previously mentioned, HN8 the FCA's whistleblower provision extends beyond those circumstances in which the plaintiff has actually filed a qui tam suit. McKenzie, 219 F.3d at 514. Perhaps the most clear cut activity that is considered "protected conduct" in this regard is when a plaintiff formally investigates conduct by his employer, informs his employer that he intends to file a qui tam action, and is subsequently terminated. In Eberhardt v. Integrated Design & Construction, Inc., 167 F.3d 861 (4th Cir. 1999), [**14] the plaintiff initiated a qui tam action against his former [*15] employer under 31 U.S.C. § 3730(b)(1) for alleged false billing of the government in violation of the False Claims Act, 31 U.S.C. § 3729, and a retaliation claim pursuant to 31 U.S.C. § 3730(h). 167 F.3d at 864. In that case, prior to filing the qui tam action, the plaintiff led a formal investigation of the fraudulent billings accusations and, following the completion of this effort, had his salary reduced and his job restructured outside of his expertise. Id. at 865. The plaintiff then informed the employer that he was protected by the False Claims Act and indicated his intention to file a qui tam action. After declining to perform his newly assigned job duties, the plaintiff was terminated. Id. at 865-66. In Eberhardt, the Fourth Circuit found that the plaintiff had established a prima facie case of retaliation under section 3730(h), as his "acts constituted the 'initiation of . . . an action . . . to be filed [under the FCA],' [and thus the plaintiff] engaged in protected activity." Id. at 867 [**15] (quoting 31 U.S.C. § 3730(h)).

Despite what occurred in Eberhardt, HN9 it is clear that a plaintiff need not inform his employer that he is contemplating filing a qui tam action to come within the

protection of section 3730. In the seminal case of Yesudian, the plaintiff, who was employed by Howard University, repeatedly advised [his supervisor's] superiors that he had evidence [that his supervisor] falsified time and attendance records, provided inside information to favored vendors to aid them in the bidding process, accepted bribes from vendors, permitted payments to vendors who did not provide services to the University, and took University property home for personal use. 153 F.3d at 740. The District of Columbia Circuit noted that

> a University Vice President . . . asked [the plaintiff] to provide more specific information regarding these charges . . . so that they can be properly investigated. Yesudian collected evidence from other employees to corroborate the claim that [his supervisor's] assistant had not worked the days for which she received credit. He also took photographs of University property he **[**16]** believed [his supervisor] had taken for personal use. And he collected further documentation which he provided to [another] Vice President . . . .

Id. (internal quotation marks and citations omitted). The Yesudian Court concluded that "there was more than enough evidence for a reasonable juror to conclude that [the plaintiff] was engaged in . . . an investigation [of false or fraudulent claims]. Id. In Childree v. UAP/GA AG Chem, Inc., 92 F.3d 1140 (11th Cir. 1996), the plaintiff testified under a subpoena at a Department of Agriculture ("DOA") hearing about a fraudulent billing scheme involving her employer. Id. at 1143. Following this testimony, the plaintiff's employment was terminated because she had removed confidential customer files that related to the billing scheme and were produced by the plaintiff at the DOA hearing. Id. While the plaintiff conceded that she had never anticipated filing a qui tam action, the Eleventh Circuit found that summary judgment should not have been granted

for the plaintiff's former employer because the filing of a FCA claim by the government was "a distinct possibility" when the plaintiff [**17] gave her testimony about the fraudulent billing scheme. Id. at 1146. In Neal v. Honeywell, Inc., 33 F.3d 860 (7th Cir. 1994), the plaintiff became aware that her co-workers were falsifying ammunition test data and "told Honeywell's legal counsel, who immediately notified the Army and commenced an investigation." Id. at 861. The Seventh [*16] Circuit found that section 3730(h) "expressly covers investigatory activities preceding litigation. What [the plaintiff] did, supplying information that set off an investigation, fits comfortably into this category." Id.

However, HN10 courts have drawn the line at what is considered "protected activity" when it comes to a plaintiff simply reporting concerns to a supervisor, finding that in such circumstances the plaintiff is not acting "in furtherance of" a qui tam action. McKenzie, 219 F.3d at 515. In Zahodnick v. International Business Machines Corp., 135 F.3d 911 (4th Cir. 1997) (per curiam), the plaintiff reported to his supervisor that other employees were billing their work on a project with the Defense Intelligence Agency to the wrong account. Id. at 913. [**18] The plaintiff asserted that following this report to his supervisor, "he began receiving negative treatment . . ." in several respects from his employer. Id. The Fourth Circuit found that the plaintiff did not take acts "in furtherance of a quit tam suit" as

> the record disclosed that [he] merely informed a supervisor of the problem and sought confirmation that a correction was made; he never informed anyone that he was pursuing a qui tam action. Simply reporting his concern of a mischarging to the government to his supervisor does not suffice to establish that Zahodnick was acting 'in furtherance of' a qui tam action.

Id. at 914. In Hutchins v. Wilentz, Goldman & Spitzer, 253 F.3d 176 (3d Cir. 2001), a partner at a law firm asked the

plaintiff, a paralegal, "to investigate certain client bills, with particular attention to the 'high cost' of certain computerized research." Id. at 179-80. After completing his investigation, the plaintiff submitted a memorandum detailing his concerns about the firm's billing practices. Approximately one month later, the plaintiff was terminated based on the law firm's belief that **[**19]** he was the author of an anonymous disparaging memorandum that had been circulated about another paralegal. Id. at 180. Following his termination, the plaintiff notified the United States Bankruptcy Trustee "by sworn affidavit" that he believed the law firm was engaged in unlawful billing practices when it submitted fraudulent legal bills for approval to the United States Bankruptcy Court. Id. at 181. The plaintiff subsequently filed both a qui tam and a retaliation claim. Id. The district court granted summary judgment to the defendant law firm because it found that the plaintiff had failed to engage in "protected conduct" as his actions were merely the product of an assignment that he was given by the firm. Id. at 186-87. In part, the district court found that the "investigation and reporting of the . . . billing practice was not 'protected conduct' because, . . . it was not the result of plaintiff's independent investigation prompted by a suspicion of fraud upon the government." Id. at 186-87 (citation omitted). In affirming the district court, the Third Circuit noted that "determining what activities constitute **[**20]** 'protected conduct' is a fact specific inquiry. . . . Under the appropriate set of facts, these activities can include internal reporting and investigation of an employer's false or fraudulent claims." Id. The Circuit Court in Hutchins also commented that the plaintiff

never threatened to report his discovery . . . to a governmental authority, nor did he file a False Claims Act suit until after he was terminated. Furthermore, [he] never informed his supervisors he believed this billing practice was 'illegal,' or that the practice was fraudulently causing

government funds to be lost or spent. Nor did he advise his employer that corporate counsel be involved in the matter.

[*17] Id. at 193 (internal citations omitted). In McKenzie v. BellSouth Telecommunications, Inc., 219 F.3d 508, the plaintiff claimed that "she engaged in protected activity when she informed supervisors, union stewards, and BellSouth auditors about the falsification of repair records." The Sixth Circuit concluded that "although internal reporting may constitute protected activity, the internal reports must allege fraud on the government." Id. at 516. [**21] The McKenzie Court found in that case that "legal action was not a reasonable or distinct possibility . . . [as] the 'in furtherance of' language requires more than merely reporting wrongdoing to supervisors." Id. Notably, the Sixth Circuit concluded that the plaintiff's "numerous complaints on the matter were directed at the stress from and pressure to falsify records, not toward an investigation into fraud on the federal government." Id. at 517. In Yesudian, HN11 the District of Columbia Circuit stated that it is

> sufficient that a plaintiff be investigating matters that 'reasonably could lead' to a viable False Claims Act case. Mere dissatisfaction with one's treatment on the job is not, of course, enough. Nor is an employee's investigation of nothing more than his employer's non-compliance with federal or state regulations. To be covered by the False Claims Act, the plaintiff's investigation must concern 'false or fraudulent' claims.

153 F.3d at 740 (internal citations omitted).

HN12 Plaintiffs who alert supervisors about improprieties simply in an attempt to have the employer comply with federal regulations also have failed to [**22] engage in "protected activity." In Brandon v. Anesthesia & Pain Management Associates, Ltd., 277 F.3d 936 (7th Cir. 2002),

the plaintiff notified shareholders of the defendant that he was concerned about their medicare billing practices and contacted Medicare for information about their billing rules. Id. at 944. The Seventh Circuit found that while the plaintiff "used terms like 'illegal,' 'improper,' and 'fraudulent' when he confronted the shareholders about the billing practices[,]" his conduct was not protected under the FCA because he "was simply trying to convince the shareholders to comply with the Medicare billing regulations." Id. at 944-45. The Brandon Court noted that the plaintiff "never explicitly told the shareholders that he believed they were violating the FCA and had never threatened to bring a qui tam action. He never threatened to report their conduct to the government until after he was discharged." Id. In United States ex rel. Ramseyer v. Century Healthcare Corp., 90 F.3d 1514 (10th Cir. 1996), the plaintiff "regularly communicated to her superiors 'information regarding non-compliance **[**23]** with the required minimum program components [of Medicare].'" Id. at 1522-23. The Tenth Circuit noted that the "plaintiff never suggested to defendants that she intended to utilize such noncompliance in furtherance of an FCA action. Plaintiff gave no suggestion that she was going to report such noncompliance to government officials, nor did she provide any indication that she was contemplating her own qui tam action." Id. at 1523 (internal citation omitted). Rather, the Ramseyer Court observed, the plaintiff's complaints fell within her job duties and thus failed to put the defendants "on notice that she was acting 'in furtherance of' an FCA action[.]" Id. at 1523.

Here, the plaintiff asserts in his deposition that he reported numerous transgressions to Sibley officials. His first allegation was that Jack Reynolds and his wife purportedly used Project vehicles, Project staff members, and Project resources that were paid for with USAID money for personal purposes. Plaintiff's Opposition to Defendant's Motion for Summary Judgment **[*18]** ("Pl.'s Opp'n"), Plaintiff's Exhibit

List, Exhibit ("Ex.") G (Plaintiff's deposition testimony) [**24] at 183. The basis for his complaints to his superiors regarding Jack Reynolds' "use [of] project cars for his wife, for his shopping, for his gas tank, and for some other things," was because the plaintiff was apparently denied the use of such vehicles and not that the conduct was fraudulent. Id. Second, the plaintiff also alleged that a mini-typographic machine was improperly purchased for the Georgian Federation of Professional Accountants and Auditors ("GFPAA") at an inflated price, and used to print both political and commercial literature. Id. at p. 188. The plaintiff states that when he informed Reynolds that he could get the machine for a cheaper price, "Reynolds said, okay, I cannot deal with this right now. When I come back, we will talk about this." Id. However, when Reynolds returned, there was no further discussion and he authorized the purchase of the machine. Id. The Court notes that the plaintiff explained during his deposition that the crux of his claim regarding the purchase of this machine is Sibley's representation to the USAID that "it was [acquired through an] open and fair bidding process." Id. at 189. The plaintiff stated that the USAID's [**25] policy required three bids from different companies and that Sibley had falsely stated to the USAID that it received three bids when it really only received one bid. Id. at 189-192. The plaintiff, along with a co-worker, apparently sent this information to Sibley headquarters in the District of Columbia, and they were informed that a final decision was not going to be made until Reynolds arrived. Id. at 187. However, as indicated above, Reynolds never addressed the situation. Id. at 188. The plaintiff's third allegation is that the GFPAA leased three separate offices throughout the Republic of Georgia with USAID funding from Sibley and that the offices were located either in a private residence, in the building of a local government, or in a private business. Id. at 207. Between June and July of 1999, the plaintiff conducted training in the areas of Batumi City, Kakheti, and the Poti region. Id. at 207-221. During

these training visits, he learned that the GFPAA office in Batumi was actually the apartment of the individual in charge of that office, id. at 211, the "address that [the] head of [the] Kakheti branch was claiming as [his] office, . . . was [**26] not his private residence, but it was in the building of [a] local government[,]" id. at 214-15, and the office in the Poti region was located where the person in charge of that office had his consulting firm. Id. at 219. When he returned from these training visits, the plaintiff states that he asked Jack Reynolds if Sibley was paying for these offices. Id. at 211-12. Reynolds told the plaintiff that Sibley was renting the offices and for him not to worry about them. Id. at 212, 216-17, 220. The fourth allegation is that the branch heads at each of the above locations were employed by GFPAA at the same time they were full-time employees of other organizations. Id. at 220-22. The plaintiff stated that he informed Gary Vanderhoof about the dual employment, who in turn asked whether the plaintiff had informed Jack Reynolds about this situation. Id. at 222. When the plaintiff indicated that he had informed Reynolds, Vanderhoof stated "okay, then he'll take it from there." Id. The last allegation discussed by the plaintiff in his deposition testimony is that Sibley indicated on documents submitted to the USAID that the chairman and two deputy chairmen of [**27] GFPAA were actually being paid more than what was being reported. Id. at 198. The plaintiff stated that Sibley did this because the USAID would be "a little upset because [the] project had spent a lot of money, but results [were] not adequate." Id. The [*19] plaintiff indicated that he asked Gary Vanderhoof why Sibley only reported half of these individuals' salaries to USAID and was told "don't get involved." Id.

The plaintiff was asked during his deposition whether he reported any of these incidents to the USAID. Id. at 217. He acknowledged that he never contacted the USAID, but stated that Sibley employees were instructed not to contact the

USAID directly "on any issues other than issues related to [their] specific area of activities or on issues [they were] authorized to contact USAID in advance." Id. at 217-18. The plaintiff testified that after he made the above inquiries, "eventually Gary [Vanderhoof] told me, Shekoyan, don't make too much noise. Let us finish with this [contract] extension [with the USAID] and [the] new project and then we will deal with whatever issues you have to deal with." Id. at 224-25. The plaintiff was then asked during **[**28]** his deposition: "But you were concerned enough about it that you made noise about it, you complained about it, right, because you thought that these people were stealing money, money that they weren't entitled to?" Id. at 225. In response to this question, the plaintiff answered, "this is your conclusion. What I thought was that something inappropriate is taking place. We have to either shed light on it to find out what's really going on or just --[.]" Id. The defendant's attorney later asked, "and you had concluded, I gather, by sometime in the mid-1999 that there was corruption in connection with the GEAR project?" Id. at 228. The plaintiff's response to this question is particularly significant, because he stated:

Absolutely no. I do not agree with this statement. I have never concluded that there was a corruption. I thought that there are some issues that need to be kind of addressed or corrected or fixed or I don't know, worked out, but I did not conclude that there was a corruption.

Id.

In Luckey v. Baxter Healthcare Corp., 183 F.3d 730 (7th Cir. 1999), the Seventh Circuit noted that "an employer is entitled to treat a suggestion **[**29]** for improvement as what it purports to be rather than as a precursor to litigation." Id. at 733. Thus, in Hutchins, the Third Circuit found that the plaintiff's complaints to his supervisor about the firm's billing policy was a "suggestion for improvement . . . rather

than a precursor to litigation[,]" Luckey, 183 F.3d at 733, as Hutchins never informed his supervisor "that he thought the practice was illegal or fraudulently causing loss of government funds." 253 F.3d at 193. The Hutchins Court found the circumstances in that case similar to those in Zahodnick, where the plaintiff there "merely informed a supervisor of a problem and sought confirmation that a correction was made." Hutchins, 253 F.3d at 193 (quoting Zahodnick, 135 F.3d at 914). Similarly, many courts have found that internal reports in which a plaintiff sought to have his employer comply with federal or state regulations do not fall within the scope of the FCA. See McKenzie, 219 F.3d at 516; Yesudian, 153 F.3d at 743.

In this case, the Court is simply unable to find that the plaintiff has **[**30]** raised a genuine issue of material fact concerning whether he engaged in "protected activity" in furtherance of a viable FCA action. Rather, all of the plaintiff's complaints to his supervisors constituted suggestions designed to improve or benefit Sibley. Even in his amended complaint, the plaintiff states that he "was a dedicated employee of Sibley International who wanted to cure the defects in the company caused by malfeasors, **[*20]** but not to destroy the company." First Amended Complaint at P 69. The plaintiff simply made internal inquiries or complaints to his supervisors about his concerns, and he was adamant during his deposition that he had never concluded that Sibley was involved in corruption. Pl.'s Opp'n, Ex. G at 228. It is clear from the record that there was no "nexus" between the plaintiff's inquiries and complaints and the "'in furtherance' prong of an FCA action" when the acts the plaintiff contends constituted "protected activities" occurred. McKenzie, 219 F.3d at 515. In McKenzie, the Sixth Circuit concluded that the plaintiff's "numerous complaints on the matter were directed at the stress from and pressure to falsify records, not towards an investigation **[**31]** into fraud on the federal government."

219 F.3d at 517. Similarly, here the plaintiff's deposition testimony indicates that his inquiries and complaints were designed to bring to the attention of his employer "issues that needed to be . . . addressed or corrected or fixed or . . . worked out . . ." in the absence of a belief on plaintiff's part "that there was . . . corruption" occurring. Pl.'s Opp'n, Ex. G at 228. As such, the plaintiff's actions were not "reasonably connected to the FCA, which was designed to encourage and protect federal whistleblowers[,]" McKenzie, 219 F.3d at 515 (citing S. Rep. No. 99-345, at 35, reprinted in 1986 U.S.C.C.A.N. at 5300 ("encouraging those that 'may be considering exposing fraud . . . [by protecting them] from retaliatory acts'")), but were merely efforts to alert Sibley about possible improprieties. Accordingly, the Court finds that the plaintiff has failed to establish that he was engaged in "protected activity" under the FCA.

(2) Was the Defendant's Alleged Retaliation Motivated by the Plaintiff's Participation in Protected Activity?

Even if the plaintiff could establish that he engaged [**32] in protected activity in furtherance of an FCA action, the Court would nonetheless have to find that he has failed to establish that he suffered an adverse employment action "because of activities which the employer had reason to believe were taken in contemplation of a qui tam action against the employer." McKenzie, 219 F.3d at 518 (emphasis omitted). The McKenzie Court noted that HN13 "the FCA's legislative history states that the employee must show that 'the retaliation was motivated at least in part by the employee's engaging in protected activity.'" Id. (quoting S. Rep. No. 99-345, at 35, reprinted in 1986 U.S.C.C.A.N. at 5300); see Yesudian, 153 F.3d at 736 (same). In Karvelas v. Melrose-Wakefield Hospital, 360 F.3d 220, 2004 U.S. App. LEXIS 3238, 2004 WL 324465 (1st Cir. Feb. 23, 2004), the First Circuit recently commented that "in order to state a claim for retaliation, [a plaintiff] must also allege that he was

terminated because of his protected conduct." Id. at *15. In that case, in which the district court had granted the defendant's motion to dismiss, the Karvelas Court found that the plaintiff had failed to satisfy [**33] his pleading requirements because "nowhere in his complaint does [he] allege a factual predicate concrete enough to support his conclusory statement that he was retaliated against because of conduct protected under the FCA." Id. Here, after allowing the plaintiff to file an amended complaint to conform with Federal Rule of Civil Procedure 9(b),[3] there is nothing in the record to support the plaintiff's claim that he was terminated because of his [*21] participation in protected activity under the FCA. The plaintiff states in a conclusory fashion in his amended complaint that "in return for his efforts to eradicate corruption and protect Sibley International from liability, he was fired. Plaintiff Shekoyan's termination was, in part, effected in retaliation for his reporting violations of the False Claims Act, 31 U.S.C. Section 3729." Am. Compl. at PP 72-73. And, in his opposition to the defendant's summary judgment motion, he fails to even address this element of the section 3730(h) prima facie case. See Pl.'s Opp'n at 28-31. Thus, there is nothing in the record to establish that the plaintiff has raised a genuine [**34] issue of material fact that he suffered an adverse employment action as a result of engaging in any protected activity in furtherance of an FCA action. Accordingly, the Court finds that the plaintiff has failed to establish that he suffered an adverse employment action "because of activities which the employer had reason to believe were taken in contemplation of a qui tam action against the employer." McKenzie, 219 F.3d at 518 (emphasis omitted). The defendant's request for summary judgment on the plaintiff's FCA section 3730(h) retaliation claim will

[3] The Court notes that in its August 16, 2002 Memorandum Opinion and Order, it denied the defendant's motion to dismiss the plaintiff's FCA claim, instead permitting the plaintiff to file an amended complaint so he could comply with Fed. R. Civ. P. 9(b).

therefore be granted.[4] [**35]

(B) The District of Columbia Claims

With the Court's grant of summary judgment on the plaintiff's FCA claim, the only remaining claims asserted by the plaintiff are his claim of discriminatory termination of his employment because of his national origin in violation of the DCHRA, D.C. Code §§ 2-1401.01-1403.17 (2001), and the District of Columbia common law claims of breach of contract, defamation, and intentional infliction of emotional distress. See Am. Compl. PP 21-67, 74-90. 28 U.S.C. § 1367 states that

HN15 in any civil action of which the district courts have original jurisdiction, the district courts shall have supplemental jurisdiction over all other claims that are so related to claims in the action within such original jurisdiction that they form part of the same case or controversy under Article III of the United States Constitution.

28 U.S.C. § 1367(a). The Court's supplemental jurisdiction was the reason it declined to dismiss these claims in its August 16, 2002 Memorandum Opinion. See **Shekoyan, 217 F. Supp. 2d at 75-76**. However, that ruling [**36] was dependent on the existence of a viable federal claim. Now that the plaintiff's FCA claim has been dismissed, all of the plaintiff's federal claims are out of the picture. Therefore, the

[4] As this Court discusses above, to establish a prima facie case under section 3730(h), a plaintiff must prove: (1) that he engaged in protected activity in furtherance of an FCA action, (2) that the employer knew about it, and (3) that the employer retaliated against the plaintiff for participating in this protected activity. McKenzie, 219 F.3d at 514; Yesudian, 153 F.3d at 736. Because the Court finds that the plaintiff has failed to establish that he engaged in protected activity in furtherance of an FCA action and that the defendant retaliated against him because of such conduct, the Court need not address whether the employer was aware of the plaintiff's conduct.

Court will decline to further exercise supplemental jurisdiction over the plaintiff's District of Columbia claims. 28 U.S.C. § 1367(c) states that [IIN15] "the district courts may decline to exercise supplemental jurisdiction over a claim under subsection (a) if the district court has dismissed all claims over which it has original jurisdiction[.]" 28 U.S.C. § 1367(c)(3); see Kingman Park Civic Ass'n v. Williams, 358 U.S. App. D.C. 295, 348 F.3d 1033, 1043 (D.C. Cir. 2003) (affirming district court's dismissal under 28 U.S.C. § 1367 of the pendent District of Columbia law claims "where all of the federal claims were properly resolved against [the plaintiff]"). Critical to the Court's decision to **[*22]** dismiss the non-federal claims is [IIN16] 28 U.S.C. § 1367(d), which provides that the period of limitations for any of these District of Columbia law claims "shall be tolled while the claim is pending and for a period of 30 days **[**37]** after it is dismissed unless State law provides for a longer tolling period." 28 U.S.C. § 1367(d); see Neal v. District of Columbia, 327 U.S. App. D.C. 322, 131 F.3d 172, 175 n.5 (D.C. Cir. 1998) (quoting 28 U.S.C. § 1367(d)) (noting that "dismissals for lack of supplemental jurisdiction are without prejudice, and the limitations period for a claim dismissed for this reason is tolled 'while the claim is pending and for a period of 30 days after it is dismissed unless State law provides for a longer tolling period.'"). Thus, applicable statutes of limitations will not adversely impact plaintiff's ability to pursue his District of Columbia claims in the local court system. Finally, the Court will also dismiss the defendant's counterclaim for conversion and trespass to chattels pursuant to 28 U.S.C. § 1367(c), which may also be pursued in the local court system.

IV. Conclusion

For the reasons set forth above, this Court will grant summary judgment to the defendant on the plaintiff's FCA claim, as the plaintiff has failed to establish a prima facie case of conduct protected by 31 U.S.C. § 3730 **[**38]** (h),

and this claim will therefore be dismissed. In addition, pursuant to 28 U.S.C. § 1367(c), the Court will dismiss the defendant's counterclaim for conversion and trespass to chattels and the plaintiff's DCHRA, breach of contract, defamation, and intentional infliction of emotional distress claims.[5] n5

SO ORDERED this 19th day of March, 2004.

REGGIE B. WALTON

UNITED STATES DISTRICT JUDGE

[5] An Order consistent with the Court's ruling accompanies this Memorandum Opinion.

(2)

No. 05-738

In The
Supreme Court of the United States

VLADIMIR SHEKOYAN,

Petitioner,

v.

SIBLEY INTERNATIONAL, INC.,

Respondent.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The D.C. Circuit

RESPONDENT'S BRIEF IN OPPOSITION

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QUESTIONS PRESENTED[1]

1. Did the lower courts correctly conclude Title VII applies extraterritorially only to "a citizen of the United States," as the plain language of the statute states and as every other court to consider the issue also has held? Did the lower courts also correctly conclude, again consistently with all other courts that have considered the locale of employment for Title VII purposes, that Petitioner was not employed within the United States when he worked for Respondent in the Republic of Georgia?

2. Given Petitioner's admission that he never believed, either at the time of the events in question or after he filed suit, that Respondent had engaged in any fraud in connection with its contract with the United States Agency for International Development ("USAID"), did the lower courts correctly conclude, as have numerous other courts, that summary judgment was properly granted to Respondent on Petitioner's False Claims Act ("FCA") "whistleblower" claim?

3. Did the district court act within its discretion by (a) refusing to allow Petitioner to file a motion for summary judgment nine months after discovery had closed and the court-ordered deadline for filing dispositive motions had passed; (b) chronicling in a lengthy order the accusations of misconduct that arose because of Petitioner's improper submissions in opposition to Respondent's motion for summary judgment and issuing appropriate directives to

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[1] Petitioner's "Questions" bear little resemblance to the issues actually raised by the record and decided by the lower courts. Respondent therefore restates the questions presented by this case.

QUESTIONS PRESENTED – Continued

comply in the future with court rules, granting in part Respondent's motion to strike and denying Petitioner's Rule 11 motion for sanctions; and (c) dismissing Petitioner's District of Columbia and common law claims after dismissing his federal claims?

PARTIES TO THE PROCEEDINGS BELOW

The plaintiff below is petitioner Vladimir Shekoyan. The defendant below is respondent Sibley International Corporation.

CORPORATE DISCLOSURE STATEMENT

Pursuant to Supreme Court Rule 29.6, Respondent Sibley International Corporation states that it is a privately held corporation organized under the laws of the State of Delaware and residing in the District of Columbia. There are no parent corporations or publicly held companies owning 10% or more of Respondent's stock.

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STATUTES

MISCELLANEOUS

STATUTE INVOLVED[2]

42 U.S.C. § 2000e(f):

For purposes of this subchapter –

(f) The term "employee" means an individual employed by an employer, except that the term "employee" shall not include any person elected to public office in any State or political subdivision of any State by the qualified voters thereof, or any person chosen by such officer to be on such officer's personal staff, or an appointee on the policy making level or an immediate advisor with respect to the exercise of the constitutional or legal powers of the office. The exemption set forth in the preceding sentence shall not include employees subject to the civil service laws of a State government, government agency or political subdivision. *With respect to employment in a foreign country, such term includes an individual who is a citizen of the United States.* (Emphasis added.)

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[2] Petitioner fails to include in either the body of or appendix to his petition the pivotal statute at issue.

STATEMENT OF THE CASE[3]

I. RESPONDENT HIRES PETITIONER TO WORK ON A SPECIFIED PROJECT IN THE REPUBLIC OF GEORGIA; WHEN THE CONTRACT PERIOD ENDS, RESPONDENT DOES NOT ENTER INTO A NEW CONTRACT WITH HIM

Respondent Sibley International Corporation ("Sibley") is a small consulting company headquartered in Washington, D.C. (App. 265 (Rec. 67, 446)[4]) A qualified, woman-owned business enterprise, Sibley has been awarded several contracts with USAID to assist foreign governments in implementing accounting reform. (App. 265 (Rec. 53a, 446, 454-55)) In 1997, Sibley was awarded the contract, termed a "Task Order," for the Georgia Enterprise Accounting Reform ("GEAR") project to assist the Republic of Georgia in transitioning from command to market accounting and developing enterprise market accounting and auditing practices. (App. 265-66 (Rec. 53a, 446-47))

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[3] Petitioner fails to identify where in the record the purported "Facts" cited as support for his Statement of the Case are located. Suffice it to say many of his asserted "Facts" are unproven claims and allegations. The Circuit Court of Appeals in its published opinion, 409 F.3d 414, 417-19 (D.C. Cir. 2005), and the district court in its two published memorandum decisions, *Shekoyan v. Sibley International Corp.*, 217 F. Supp. 2d 59, 62-63 and 66-69 (D.D.C. 2002), and *Shekoyan v. Sibley International Corp.*, 309 F. Supp. 2d 9, 11-12, 17-19 (D.D.C. 2004), provide a cogent overview of the case based on the relevant pleadings and the admissible evidence. Sibley augments the lower courts' discussion to insure this Court has before it a fair and balanced view of the case.

[4] "App." and "App.Ex." citations are to the Joint Appendix Petitioner filed on January 12, 2004 in conjunction with his appellate briefing. "Rec." citations are to the complete record Sibley filed on May 28, 2004, in support of a motion for summary affirmance. Both sets of volumes were before the Court of Appeals and cited to by the parties.

Sibley offered Petitioner Vladimir Shekoyan the position of Training Advisor. (App. 267 (Rec. 448, 604-05)) Although concerned he did not have the technical accounting experience it was looking for, Sibley concluded he could probably do the job with some assistance and his familiarity with Eastern Europe would likely benefit the project. (App.Ex. 145, 249 (Rec. 956, 1082)) Shekoyan claims Sibley personnel promised he would have long-term employment with the company if he was successful in the Training Advisor position. (App.Ex. 11 (Rec. 790)) Sibley disputes any such assurance, and his written employment agreement contained no such promise, stating he was hired for a specific position for the 1997 GEAR project, which was anticipated to last 21 months and would end October 31, 1999. (App. 265, 267 (Rec. 446, 448, 604-05))

At the time, Shekoyan was an Armenian citizen and legal resident of the United States. (App. 135A, App.Ex. 6-7, 10 (Rec. 187, 785-86, 789)) He had lived in the United States less than five years and was not yet eligible to file an application to become a naturalized citizen. (App. 135A, 160, App.Ex. 7, 10 (Rec. 187, 213, 786, 789))

In its contract with USAID, Sibley identified Shekoyan as one of several "U.S. Expatriate Professionals" who would be working on the GEAR project in the Republic of Georgia. (Rec. 481, 485, 602) Thus, contrary to Shekoyan's repeated claim, Sibley did not designate him a "U.S. National." Moreover, Sibley's contract classification had no bearing on his, or any other employee's, immigration status. (*Compare* App. 160, 163, App.Ex. 33-49 (Rec. 213, 216, 812-28)) Rather, it was a labor classification for wage and accounting purposes (as were the two other contract designations of "Locally-Hired National Personnel" and "Third Country National Personnel"). (App. 747 (Rec. 481-87,

532, 559, 602, 634, 1865)) Nor was Shekoyan a "U.S. diplomat." As the district court observed, the copy of a "Service Card" he submitted does not come close to establishing that he worked for the State Department or was an official representative and envoy of the United States government.[5] (App. 890 (Rec. 2169 n.2)) Indeed, Sibley's contract with USAID expressly provided USAID "shall *not* exercise any supervision or control over the contractor's employees performing services under this contract. Such employees shall *not* be accountable to the government, but solely the contractor, who in turn is responsible to the Government." (Rec. 518 (emphasis added))

As the job required, Shekoyan moved to the Republic of Georgia, where he lived and worked until October 31, 1999, when Sibley's 1997 Task Order for the GEAR project ended. (App. 184, App.Ex. 267-68 (Rec. 53b, 237, 448-49, 470-71, 612)) Shekoyan received all of the compensation to which he was entitled under his employment agreement. (App. 267-69 (Rec. 448-50, 470-72))

As of November 1, 1999, USAID and Sibley entered into a new contract for further work in Georgia. (App. 268-69 (Rec. 449-50, 617-34)) This new work differed in focus and purpose. (*Compare* Rec. 621-24 (1999 contract tasks/work requirements) and 546-55 (1997 contract tasks/work requirements)) Accordingly, the staffing requirements under the new contract differed substantially, and a

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[5] Shekoyan also cited to the Vienna Convention [App. 417-26 (Rec. 1683-92)], but made no showing the United States (the purported "sending state") gave due notification to the Republic of Georgia (the purported "receiving state") and then "accredited" the "head of mission" and "assign[ed] any member of the diplomatic staff" – as required under the Convention [App.Ex. 418 (Rec. 1684)].

number of positions that existed under the 1997 contract did not exist under the 1999 contract, including the Training Advisor position Shekoyan had filled. (App. 269 (Rec. 450) and *compare* Rec. 629 (1999 contract) and 559 (1997 contract staffing)) There were only two long-term contract positions available under the new contract, for Project Manager and an Accountant II. (Rec. 629) Both required extensive experience and a CPA [Rec. 469, 559], which Shekoyan admittedly did not have [App.Ex. 77, 136-37 (Rec. 856, 948-49), 1362-63; *compare* App.Ex. 187-88 (Rec. 999-1000) (Reynolds' qualifications)].

II. NEARLY ONE YEAR AFTER HIS EMPLOYMENT ENDS, PETITIONER FILES SUIT FOR "WRONGFUL TERMINATION"; THE DISTRICT COURT VARIOUSLY DISMISSES AND GRANTS SUMMARY JUDGMENT ON HIS ARRAY OF CLAIMS

Nearly one year after his employment with Sibley ended, Shekoyan filed this lawsuit on October 20, 2000, claiming he was discriminated against on the basis of his Armenian ethnicity and wrongfully discharged in violation of Title VII, the "whistle-blower" provisions of the False Claims Act, and the District of Columbia Human Rights Act, and wronged by other conduct under a variety of common law theories. (App. 1-18)

Sibley moved to dismiss Shekoyan's Title VII claim on the ground the statute's extraterritorial application extends – as it states – only to United States citizens, and Shekoyan did not allege, and could not allege, that he was a United States citizen when he worked for Sibley in the Republic of Georgia. (App. 46-48) Sibley also moved to dismiss his False Claims Act claim on the ground he had not adequately alleged all the requisite

elements [App. 48-51], and to dismiss his local and common law claims on the ground that, in the absence of any viable federal claim, the district court lacked supplemental jurisdiction [App. 51].

Shekoyan filed extensive opposition. (App. 53-91) He admitted he was not "a citizen of the United States" when he worked for Sibley in the Republic of Georgia [App. 3, 53], but argued Sibley had essentially classified him in its contract as a "United States national" and "nationals" should be covered extraterritorially under Title VII [App. 59-78]. He also argued he had sufficiently alleged a claim under the False Claims Act and asked for leave to amend. (App. 78-84)

In a published memorandum decision filed August 18, 2002 (217 F. Supp. 2d at 59), the district court dismissed Shekoyan's Title VII claim [*id.* at 64-69], but allowed him to file an amended complaint augmenting his False Claims Act allegations [*id.* at 74-75]. Accordingly, the court also retained jurisdiction over his District of Columbia and common law claims [*id.* at 75-76]. On September 2, 2002, Shekoyan filed a first amended complaint. (App. 135A-59) Sibley answered, denied Shekoyan's claims of wrongdoing and asserted a counterclaim for the value of GEAR property that had not been accounted for during his employment. (App. 196-208)

Following discovery, Sibley moved for summary judgment on Shekoyan's remaining claims. (App. 223-270 (Rec. 401-640, 452-640)) With respect to his False Claims Act claim, Sibley demonstrated there was no evidence raising a triable issue that Shekoyan had engaged in "protected activity" or that he had been discriminated against because of such activity. (App. 240-50) Not only was there no evidence Shekoyan had undertaken to expose any fraud by Sibley in connection with its contract with

USAID, but he categorically denied in his deposition that he had ever believed there was any fraud: "I have never concluded there was corruption. I thought there are some issues that need to be kind of addressed or corrected or fixed or I don't know, worked out, but I did not conclude that there was corruption." (Rec. 596) Thus, even according to Shekoyan, the most he had done was raise internal concerns about some operational matters so Sibley personnel could take a look at them and modify or change them if appropriate. (Rec. 594-96)

Shekoyan filed extensive opposition, much of it directed to his claim under District of Columbia law that he had been harassed on the basis of his Armenian ethnicity. (App. 278-390, App.Ex. 1-386) According to Shekoyan, in the spring of 1999 he had temporarily filled in as Project Manager, and in mid-June 1999, was replaced by Jack Reynolds. (App.Ex. 14-15) He claimed Reynolds belittled and harassed him, creating a "hostile work environment." (App.Ex. 15-16) He also claimed he complained about Reynolds to Sibley personnel in Washington, D.C., but was told to try to work out the problems locally. (App.Ex. 16) He further claimed he told Sibley personnel in Washington, D.C., about concerns he had about how the GEAR project was being run, but was told not to "make too much noise." (App.Ex. 110) Approximately three months after Reynolds took over as Project Manager, and one month before the 1997 Task Order expired, Shekoyan was told he would not receive a new employment contract when his current contract ended. (Rec. 612)

Shekoyan purported to substantiate his claims with an unnotorized affidavit by his attorney recounting the supposed substance of telephone "interviews" with two former Sibley employees [App.Ex. 281-89], a "draft"

declaration one of the former employees supposedly was going to sign [App.Ex. 225-32], and exhibits and testimony that did not support the propositions for which they were cited [Rec. 1345-59]. Sibley moved to strike the improper submissions and recover its costs under Fed. R. Civ. P. 56(g). (App. 501-33 (Rec. 1326-74)) It also submitted signed and sworn declarations by the former Sibley employees. (Rec. 1361-71) Both stated Shekoyan's lawyer had made serious misstatements about her conversations with them and that they had not, and could not, substantiate any of Shekoyan's claims of harassment and discrimination. (*Id.*) Indeed, one of the declarants, David Bose, who had been Sibley's chief financial officer, felt pressured by Shekoyan's lawyer and told her several times he had no recollection of Shekoyan ever complaining about discriminatory treatment while he was employed by Sibley. (Rec. 1369) Bose was confident he would have remembered any such complaints since he, too, is a person of color. (*Id.*[6])

The other declarant, Gary Vanderhoof, who had been Sibley's vice-president and to whom Shekoyan claimed to have reported concerns about the GEAR program, stated all he could recall was an incident between Reynolds and Shekoyan just days prior to the expiration of Shekoyan's employment contract. (Rec. 1364) Reynolds had demanded to know about the handling of two televisions and a VCR, and reported Shekoyan had been insubordinate about responding. (*Id.*; *see also* Rec. 464-65, 476, 797, 1128-29)

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[6] Without telling Bose, Shekoyan's lawyer had taped their conversation. (Rec. 1457 n.2) When Shekoyan finally produced a copy of the tape to Sibley, there were a number of "gaps," and despite Shekoyan's lawyer's protests to the contrary, even the extant portions of the tape confirmed that her recitation of the conversation was incorrect in numerous respects. (Rec. 1457 n.2, 1459-64)

Shekoyan called Vanderhoof and also sent an e-mail, disputing that he had been insubordinate and claiming he had timely and thoroughly responded. (Rec. 1128-32) As a result of this incident, Reynolds told Shekoyan to leave the office and not return for the few remaining days of his contract. (Rec. 466-67, 470-71, 476) In short, what the *admissible evidence* from the former Sibley employees and current employees showed was that it was not until the final month of Shekoyan's employment, after he had been told he would not receive a new employment contract, that he began complaining of any unfair treatment by Reynolds.

The district court, in a detailed, 15-page order, granted in part Sibley's motion to strike Shekoyan's improper submissions and denied Shekoyan's counter-Rule 11 motion (Rec. 1978-2031) for sanctions. (App. 1152-68)

In the meantime, Shekoyan filed a voluminous motion to "amend" the district court's prior memorandum opinion dismissing his Title VII claim. (App. 598-710, App.Ex. 387-558, 565-67) In this motion, Shekoyan expounded on his claim that he was a "United States national" and as such should have been covered under Title VII. Alternatively, he argued the court should apply a "center of gravity" standard and under it, he should be considered to have been employed "within" the United States. (App. 613-23) In another order thoroughly discussing the limited extra-territorial application of the statute, the district court denied Shekoyan's motion. (App. 887-95) Shekoyan promptly filed a motion "to vacate" the court's order refusing to amend its Title VII ruling [App. 1010-15], which the district court denied [App. 1131-32]. He also filed a 29-page motion "for oral argument," again taking issue with the district court's order denying his motion to

"amend" the Title VII ruling [App. 907-1034], which the court also denied [App. 1149]. Undeterred, Shekoyan next filed a motion for leave to "file for summary judgment out of time" [App. 1016-21], based on a 64-page "second supplemental statement of undisputed facts" [App. 1064-127]. Given that the court already had twice extended discovery [Rec. 372, 380], and nine months had passed since the extended period had closed and the deadline for filing dispositive motions had lapsed [Rec. 380], the district court also denied this motion. (App. 1151-52)

On March 19, 2004, in a second published memorandum opinion (309 F. Supp. 2d at 9), the district court granted summary judgment for Sibley on Shekoyan's "whistle-blower" claim and dismissed his remaining local and common law claims. (App. 1179-2000) While acknowledging the FCA must be applied broadly to protect employees who report the misuse of government funds, the court explained there still must be a reasonable connection between the employee's conduct and the Act. Otherwise, any suggestion made or question raised by an employee about the implementation of a government funded program could give rise to a False Claims Act claim, which is not the intent or purpose of the statute. (App. 1188-95) The admissible evidence in this case, including Shekoyan's own admissions, established no more than that he had raised several concerns internally so. Sibley personnel could look into them. (App. 1991-95) The district court entered final judgment on March 19, 2004. (App. 1201-02) The Circuit Court of Appeals affirmed in a published opinion filed June 3, 2005 [409 F.3d at 414].

REASONS FOR DENYING THE PETITION

Shekoyan argues the pivotal issue in this case is whether he was a "U.S. National" when he worked for Sibley in the Republic of Georgia. Indeed, he claims this issue is one of overarching importance not just for Title VII purposes, but also for immigration, tort and criminal law generally. (Pet. Questions A, B and C) However, as the district court and Circuit Court of Appeals explained, that is not the dispositive issue in this case. Rather, the issues with respect to Shekoyan's Title VII claim are: (a) whether Title VII applies extraterritorially only to "a citizen of the United States" and (b) if Shekoyan was not a citizen of the United States, whether his employment was "in" the United States. In answering "yes" to the first question and "no" to the second, and thus concluding Title VII did not apply to Shekoyan's overseas employment, the district court and Circuit Court of Appeals applied the plain language of the statute and reached a result consistent with every other case applying the relevant statutory language. 409 F.3d at 420-22. Accordingly, there is no need for this Court to take up these issues.

Shekoyan claims the issue with respect to his "whistle-blower" claim is whether suspected fraud must be reported to a government agency, rather than to an employer. (Pet. Question D) Again, that is not the issue presented by this case. The lower courts did not hold an employee must report suspected fraud to a government official. Rather, they ruled that on this record there was no triable issue of material fact that Shekoyan engaged in protected activity – because he admitted he did not believe any fraud or corruption had occurred and had brought his concerns to the attention of Sibley officials so they could look into them. Again consistent with all prior case law, the district

court and Circuit Court of Appeals held this was insufficient to raise a triable issue under the FCA. 409 F.3d at 422-23.

Finally, Shekoyan claims this Court should revisit the abuse of discretion standard (Pet. Question E) to determine whether there must be an "independent analysis" of the facts and the law in reviewing discretionary rulings – in other words *de novo* review. Not only does this make no sense, but contrary to what Shekoyan suggests, the Circuit Court of Appeals did not simply rubber stamp the district court's discretionary case management rulings refusing to allow him to file a summary judgment motion nearly one year after the deadline for dispositive motions, denying his Rule 11 motion arising out of improper submissions by his own lawyer, and declining to retain supplemental jurisdiction over non-federal claims.

III. THE LOWER COURTS' TITLE VII RULINGS ARE CONSISTENT WITH THE ESTABLISHED CASE LAW AND RAISE NO LEGAL ISSUES THIS COURT NEEDS TO DECIDE

A. Title VII Applies Extraterritorially Only To United States Citizens, And Petitioner Was Not A United States Citizen When He Worked For Respondent In The Republic Of Georgia

In *E.E.O.C. v. Arabian Am. Oil Co.*, 499 U.S. 244, 248-59 (1991) (*Arabian Am. Oil*), this Court ruled Title VII applied only domestically, to American citizens and aliens working within the United States and specified American territories. *See also Espinoza v. Farah Mfg. Co.*, 414 U.S. 86, 95 (1973) (holding Title VII applies to aliens working in the United States). The Court grounded its holding on

the longstanding presumption against extraterritorial application of federal law in the absence of "clearly expressed" congressional intent to the contrary. 499 U.S. at 248. The Court pointed out Congress both was aware of the presumption against extraterritorial application of federal law and the necessity of speaking definitively on the issue if it intends extraterritorial reach. For example, in reaction to cases holding the Age Discrimination in Employment Act [29 U.S.C. § 630] ("ADEA") did not apply extraterritorially, Congress had amended that Act to make it "'apply to citizens of the United States employed in foreign countries by U.S. corporations or their subsidiaries.'" 499 U.S. at 258. The Court invited Congress to take the same action with respect to Title VII. *Id.*

Congress quickly accepted the invitation and amended Title VII (and the Americans with Disabilities Act [42 U.S.C. §§ 12111 *et seq.*] ("ADA")) expressly to give the statute limited extraterritorial reach. 42 U.S.C. §§ 2000e(f), 2000e-1(c). In fact, Congress used nearly the same language it had used in amending the ADEA. Thus, Title VII's definition of "employee" now provides: "With respect to employment in a foreign country, such term [employee] includes an individual *who is a citizen of the United States*." 42 U.S.C. § 2000e(f) (emphasis added); *compare* 29 U.S.C. § 630(f) (ADEA) ("The term 'employee' includes any individual who is a citizen of the United States employed by an employer in a workplace in a foreign country.").[7]

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[7] Other provisions of Title VII now cover foreign corporations "controlled" by an "employer" and provide that any practice prohibited under Title VII committed by such a "controlled" foreign corporation "shall be presumed to be engaged in" by the controlling "employer." Conversely, the statute does not apply to "foreign operations" of a

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"Together, these sections establish that Title VII applies abroad only when (1) the employee is a citizen of the United States and (2) the corporation is controlled by an American employer." *Iwata v. Stryker Corp.*, 59 F. Supp. 600, 604 (N.D. Tex. 1999); *accord Torrico v. Int'l Bus. Machs. Corp.*, 213 F. Supp. 2d 390, 399 (S.D.N.Y. 2002) ("*Torrico I*") ("it is clear that [the 1991 amendments to Title VII] distinguish between U.S. citizens working abroad for U.S. employers, who are protected from discrimination, and non-U.S. citizens working abroad for those same employers, who fall outside the statutory protections against discrimination"); *Russell v. Midwest-Werner & Pfleiderer, Inc.*, 955 F. Supp. 114, 115 (D. Kan. 1997) ("The general rule is that with respect to foreign employment, Title VII applies only to American citizens employed abroad by American companies or their foreign subsidiaries.").[8] Or, stated another way, extraterritorially, Title VII does not apply to non-citizens. *See Mousa v. Lauda Air Luftfahrt, A.G.*, 258 F. Supp. 2d 1329, 1337 (S.D. Fla. 2003) ("If the definition of "employee" [in Title VII] included all individuals working abroad, there would be no reason for Congress to expressly include United

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"foreign person not controlled by an American employer." 42 U.S.C. § 2000e-1(c). In addition, § 2000e-1(a) continues to state: "This subchapter shall not apply to an employer with respect to the employment of aliens outside any State. . . ." *Id.* § 2000e-1(a).

[8] *See also Reyes-Gaona*, 250 F.3d 861, 865 (4th Cir. 2001) (applying similar ADEA language: Congress amended ADEA "to give it limited extraterritorial application"); *Hu v. Skadden, Arps, Slate, Meagher & Flom LLP*, 76 F. Supp. 2d 476, 477 (S.D.N.Y. 1999) (applying similar ADEA language: "The extent to which the ADEA applies outside of the United States is clearly limited."); *Denty v. SmithKline Beecham Corp.*, 907 F. Supp. 879, 883 (E.D. Pa. 1995) (applying similar ADEA language: "the ADEA applies abroad only when (1) the employee is an American citizen and (2) the employer is controlled by an American employer").

States citizens."); *Russell*, 955 F. Supp. at 115 ("Unless an American citizen, a person employed abroad is not an 'employee' under Title VII.").[9]

As this Court has stated many times, "when the statute's language is plain, the sole function of the courts – at least where the disposition required by the text is not absurd – is to enforce it according to its terms." *Lamie v. United States*, 540 U.S. 526, 534 (2004). Furthermore, because the issue here concerns the extraterritorial reach of a statute, the operative presumption is against such application unless Congress has "clearly expressed" otherwise. *Arabian Am. Oil*, 499 U.S. at 248. It also must be assumed Congress acted with full knowledge of both this presumption and its obligation to be explicit when it intends federal law to apply to conduct within foreign borders. *Id.* at 248, 258-59. Thus, had Congress intended that Title VII also extend to *non*-citizens working in foreign countries, it not only could have said so, but was required to do so. *See Reyes-Gaona*, 250 F.3d at 865 (discussing similar ADEA language).[10]

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[9] *See also Hu*, 76 F. Supp. 2d at 478 (applying similar ADEA language: "the rules for extraterritorial application require a distinction between citizens and non-citizens of the United States"); *O'Loughlin v. The Pritchard Corp.*, 972 F. Supp. 1352, 1364 (D. Kan. 1997) (applying similar ADEA language: "Such specific inclusion [of citizen of the United States] leads to a reasonable negative inference that Congress intended to exclude from the definition of 'employee' non-citizens of the United States employed by an employer in a workplace in a foreign country.").

[10] In fact, in other statutes, Congress expressly has provided that they apply both to "citizens" and other classes of residents. *E.g.*, 22 U.S.C. § 2755 and 26 U.S.C. § 7701(a)(30)(A) (Arms Control Export Act: prohibiting discrimination against any United States person and defining such individuals as "a citizen or resident of the United States"); 5 U.S.C. § 5561 (Government Organization and Employees

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Shekoyan's insistence that the Court's decision in *Spector v. Norwegian Cruise Line Ltd.*, ___ U.S. ___, 125 S.Ct. 2169 (2005), has dispensed with the presumption against extraterritorial application and compels the extension of Title VII to the foreign employment of non-citizens, is wholly unfounded. In *Spector*, the Court ruled Title III of the ADA generally applies to foreign registered cruise ships operating in United States waters. As the Court discussed, for nearly a century, it has held general statutes presumptively applied to conduct on foreign registered vessels operating in United States territory, except when the internal interests of the ship are at stake. *Id.* at 2177. Accordingly, while the Court ruled the ADA generally applied to such ships, it also recognized that some Title III accommodation requirements might implicate internal ship interests. It therefore discussed at some length how courts should determine when internal ship interests exception would apply. *Id.* at 2179-84. The facts and issues in this case are not remotely similar. Nor did the Court in *Spector* even suggest it was overruling the presumption against extraterritorial application of Title VII it articulated in *Arabian Am. Oil.*

Even if the legislative history were considered, it confirms what is explicit on the face of the statute – that Congress meant what it said by using the terminology "citizen of the United States." While the amendment

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Act: defining employees as "an employee in or under an agency who is a citizen or national of the United States or an alien admitted to the United States for permanent residence"). Congress chose not to include such language in Title VII, and it is the obligation of the courts to apply the statute as written, as all courts applying this provision of Title VII, including the lower courts here, have done.

adding this language to Title VII appears to have been included in the Civil Rights Act of 1991 without discussion, there is discussion of this language in the legislative history of the amendment adding it to the ADEA. Since the language is the same and was added to both statutes for the same reason – to overcome the presumption against extraterritorial application – the legislative history of the amendment to the ADEA provides insight into the amendment of Title VII. *Torrico I*, 213 F. Supp. 2d at 399.[11] This legislative history states in pertinent part:

> The purpose behind the amendment is to insure that the citizens of the United States who are employed in a foreign workplace by U.S. corporations or their subsidiaries enjoy the protections of the [ADEA]. When considering this amendment, the Committee was cognizant of the well-established principle of sovereignty, that no nation has the right to impose its labor standards on another country. That is why the amendment is *carefully worded to apply only to citizens of the United States* who are working for U.S. corporations or their subsidiaries. It does not apply to foreign nationals working for such corporations in a foreign workplace and does not apply to foreign companies which are not controlled by U.S. firms. S. Rep. No. 98-467, at 27-28 (1984), *reprinted* in 1984 U.S.C.C.A.N. 2974, 3000-01 (emphasis added).

Nevertheless, Shekoyan claims the time has come for the courts to judicially rewrite Title VII's explicit "citizen

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[11] This is particularly true since the Court expressly invited Congress to add to Title VII the language it had added to the ADEA. *Arabian Am. Oil*, 499 U.S. at 259.

of the United States" language to also include "non-citizen, nationals of the United States." However, this is not a request that can properly be made to this Court. *See Arabian Am. Oil*, 499 U.S. at 259 (leaving it to Congress to "calibrate" the extraterritorial reach of Title VII). While Shekoyan complains applying Title VII according to its plain terms leaves him and other claimed non-citizen "nationals" without recourse for allegedly wrongful conduct and that American companies employing legal residents overseas should not be able to "selectively escape" federal anti-discrimination laws, these are arguments that must be directed to Congress.[12]

Shekoyan argues there was no possibility of interference with foreign laws in his case because he had moved to the United States, intended to become a citizen and had spiritually committed his allegiance to the United States. However, that may not be the case as to every non-citizen, legal resident. It is therefore no surprise that in the two decades since this language was added first to the ADEA, and then to Title VII and the ADA, Congress has made no attempt to change it in the face of repeated statements by the courts that this language means what it says and that these statues apply extraterritorially only to United States citizens.

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[12] Indeed, for years the courts – including this Court – held Title VII and the ADEA did not apply at all to extraterritorial employment (even that of United States citizens) in the absence of express statutory language, despite the argument this left aggrieved American citizens without a remedy. *E.g., Arabian Am. Oil*, 499 U.S. at 259 (Title VII); *Ralis v. RFE/RL, Inc.*, 770 F.2d 1121, 1124 (D.C. Cir. 1985) ("For reasons that are shrouded in mystery, Congress saw fit to limit the ADEA's compass for many years to the territorial confines of the United States.").

Furthermore, the record in this case demonstrates the wisdom of Congress' choice to draw a clear line so employees, employers and the courts can readily discern what rights are provided and obligations imposed under this law. Shekoyan claims to have been a "United States national" and thus entitled to invoke Title VII. But he certainly did not qualify as a "United States national" under established immigration law. As a leading immigration law treatise explains:

> The term nationals came into use in this country when the United States acquired territories outside its continental limits whose inhabitants were not at first given full political equality with citizens. Yet, they were deemed to owe permanent allegiance to the United States and were entitled to our country's protection. The term national was used to include these non-citizens in the larger group of persons who belonged to the national community and were not regarded as aliens. 3 Gordon & Rosenfield, *Immigration Law and Procedure*, § 11.3b, at 11-8 (1975); *accord Rabang v. INS*, 35 F.3d 1449, 1452 n.5 (9th Cir. 1994).

Consistent with this view, the Immigration and Nationality Act now defines a "national of the United States [as] (A) a citizen of the United States, or (B) a person, who, though not a citizen of the United States, owes permanent allegiance to the United States." 8 U.S.C. § 1101(a)(22). The case law, in turn, consistently has construed subsection (B), pertaining to non-citizens, as applying to only a very limited category of persons. *E.g.*, *Oliver v. United States Dep't of Justice*, 517 F.2d 426, 427-28 (2d Cir. 1975) (holding Canadian citizen who was a twenty-year, permanent resident of the United States and

married to an American citizen was not a national because she had failed to begin the naturalization process and therefore was deemed to still owe allegiance to her native country); *Carreon-Hernandez v. Levi*, 543 F.2d 637, 637-38 (8th Cir. 1976) (holding Mexican citizen who was a twenty-year resident of the United States, married to an American citizen, and living "an exemplary life, working, paying taxes, registering for the Selective Service, etc." was not a national because he had "never applied for United States citizenship"); *Hughes v. Ashcroft*, 255 F.3d 752, 756-57 (9th Cir. 2001) (holding individual born outside the United States, or one of its territories, must, at a minimum, demonstrate that he or she had applied for United States citizenship in order to be a "national").

Thus, at a minimum, to qualify as a "United States national" under immigration law, a non-citizen resident must have applied to become a United States citizen. Shekoyan was not even eligible to apply to become a citizen at the time he worked for Sibley in the Republic of Georgia because he had not yet lived in the United States for the requisite five-year period. *No* immigration law even remotely suggests legal residency, alone – and that is *all* Shekoyan had at the time – suffices to qualify as a "United States national."

Therefore, Shekoyan never has relied on immigration law to support his claimed "U.S. national" status. Rather, he claims to have been a "United States national" because Sibley classified him in its contract with USAID as a "United States expatriate." He further points out that a regulation pertaining to the contracting authority of USAID defines "U.S. national (USN)" as "an individual who is a U.S. citizen or a non-U.S. citizen lawfully admitted for permanent residence in the United States." 48

C.F.R. 702.170-16. These contracting provisions, pertaining to wage and procurement issues [App. 481-87, 523, 559, 602, 634, 1865], had no bearing on Shekoyan's or any other employee's immigration status.[13] In any case, that Shekoyan must resort to a contract provision and a regulation having nothing to do with immigration law to support his claim that he was a "United States national," demonstrates the peril of going down the road he has urged the courts to trod. The lower courts correctly declined to do so.[14]

B. Petitioner Was Not Working "In" The United States When He Worked For Respondent In The Republic Of Georgia

Relying on the Court's holding in *Espinoza*, 414 U.S. at 95, that Title VII applies to aliens employed in the United States, Shekoyan alternatively argues Title VII applied because he worked "within" the United States. In this regard, he claims he was hired in the United States, complained to Sibley personnel located in the United States about Reynold's alleged misconduct in the Republic of Georgia, and decisions about his employment status were made and/or approved by Sibley personnel located in the United States. There is no dispute, however, that

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[13] Thus, while Shekoyan repeatedly claims Sibley "admitted" he was a "United States national," it *never* made any such admission as to his *immigration* status and agreed only that he was classified as a "United States expatriate" in its contract with USAID [Rec. 481-85] and a "U.S. National" under USAID's acquisition regulations [App.Ex. 333]. (*See also* Rec. 977, 1849 n.3)

[14] As discussed, *supra* at 4, the lower courts also correctly rejected Shekoyan's claim he was a "U.S. diplomat" and therefore should be deemed to have been working on "U.S. soil."

Shekoyan's job was in the Republic of Georgia, and he lived in and went to work every day in that Eastern European country.

Again, the case law on the locale of employment for purposes of the extraterritorial application of Title VII is well established, as reflected by the lower courts' decisions here. Generally, the focus is on the location of the employee's workstation – the place where he or she reports to work on a regular basis. *Pfeiffer v. Wm. Wrigley Jr. Co.*, 755 F.2d 554, 555, 559 (7th Cir. 1985) (executive hired in the United States but assigned for extended period of time overseas was employed extraterritorially).[15] Accordingly, the courts uniformly have rejected the same kinds of arguments Shekoyan makes based on peripheral connections with the United States. *E.g.*, *Hu*, 76 F. Supp. 2d at 477-78 (fact plaintiff conducted his job search in the United States and international law firm made hiring decision in the United States did not alter fact plaintiff applied for job located in Hong Kong); *O'Loughlin*, 972 F. Supp. at 1357, 1366 (fact plaintiff worked initially in United States, was assigned to and then returned from an extraterritorial position, did not bring his extended overseas employment within statute); *Wolf*, 617 F. Supp. at 861-63 (occasional business trips to United States did not mean plaintiff's employment was in two locales, and "plaintiff's allegation that he was supervised and controlled by top management of the defendants based in the

[15] *See also Denty*, 109 F.3d at 150 (locale of job under ADEA is place where regular job duties are performed); *Wolf v. J.I. Case Co.*, 617 F. Supp. 858, 861 (E.D. Wis. 1985) ("the key factor" in determining the extraterritorial applicability of the ADEA "is the employee's 'relevant work station' ").

United States is not of any legal significance so long as the plaintiff performed his work abroad").

Nor did the lower courts improperly overlook *Torrico I*, 213 F. Supp. 2d at 390, as Shekoyan claims. Not only did the *Torrico I* Court explain the case before it involved an unusual set of circumstances [*id.* at 401], but it subsequently contrasted those unusual circumstances with Shekoyan's more run-of-the-mill circumstances. *Torrico v. Int'l Bus. Machs., Inc.*, 319 F. Supp. 2d 390, 405 (S.D.N.Y. 2004) ("*Torrico II*") (*Shekoyan* "is not materially different" from the other cases employing the workstation approach).[16]

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[16] In *Torrico*, the plaintiff worked for his American employer for six years, and his employment agreement expressly stated international assignments were temporary and that, upon return, a domestic division of the company would arrange for his subsequent domestic position. *Id.* at 393. When he was temporarily assigned to Chile, his job duties remained exactly the same, he reported directly to a domestic division and made regular business trips to New York. *Id.* The court contrasted this with other cases in which the employees were "hired to work exclusively (or almost exclusively) in foreign workplaces." *Id.* at 401, 405. Given the circumstances, the *Torrico I* Court used what it called a "center of gravity" analysis and concluded the plaintiff had alleged sufficient facts to avoid a motion to dismiss. *Id.* at 405-06. In contrast, Shekoyan had never before worked for Sibley. His employment contract did not state the assignment to the Republic of Georgia was "temporary." Nor did it state he would subsequently be reassigned by a domestic division to a domestic position. Because his job in the Republic of Georgia was the only position he ever held with Sibley, his duties were not the same as any prior domestic position. He was directly supervised by personnel located in Georgia. And he only traveled to the United States one or two times for personal vacations. Thus, as the *Torrico* Court observed, Shekoyan's employment was no different than that in all of the other cases utilizing the "workstation" approach and focusing on the locale of the employee's day to day work.

In sum, the lower courts' rejection of Shekoyan's Title VII claim is consistent with all other case authority addressing the salient issues, and there is no reason for this Court to take up this case.

IV. THE LOWER COURTS' AFFIRMANCE OF SUMMARY JUDGMENT ON PETITIONER'S FCA CLAIM ALSO IS CONSISTENT WITH THE ESTABLISHED CASE LAW AND RAISES NO LEGAL ISSUE THIS COURT NEEDS TO DECIDE

In the Court of Appeals, Shekoyan made only a cursory argument challenging the grant of summary judgment on his FCA "whistle-blower" claim (barely three pages, in contrast to the 37-pages he devoted to Title VII). Moreover, the thrust of his argument was that the district court's grant of summary judgment was "inconsistent" with the court's prior denial of Sibley's 12(b)(6) motion to dismiss. (Pet. AOB 46-48) Of course, there was nothing "inconsistent" in the rulings, and summary judgment was properly granted after discovery was undertaken and undisputed evidence established he could not prevail on a FCA claim.

Contrary to what Shekoyan now suggests, the lower courts did not formulate any new legal standard for evaluating his "whistle-blower" claim. Rather, the courts employed the established legal framework articulated by the Circuit Court in *United States ex rel. Yesudian v. Howard Univ.*, 153 F.3d 731, 736 (D.C. Cir. 1998), and followed in other circuits. And evaluated within this framework, the facts do not support a viable claim.

As the lower courts recognized, not every question raised or concern expressed by an employee can later be used as the basis for a "whistle-blower" claim. "Protected

activity" must relate to "exposing fraud" or "involvement with a false claims disclosure." *McKenzie v. BellSouth Telecomm.*, 219 F.3d 508, 515 (6th Cir. 2000). For example, in *Hutchins v. Wilentz, Goldman & Spitzer*, 253 F.3d 176 (3d Cir. 2001), a law firm partner asked the plaintiff paralegal to "investigate certain client bills, with particular attention to the 'high cost' of certain computerized legal research." *Id.* at 179-80. The plaintiff did so and prepared a memorandum detailing his concerns about the firm's billing practices. *Id.* He was subsequently terminated because the firm suspected he had authored a disparaging memo circulated by another paralegal. *Id.* at 181. The Third Circuit affirmed summary judgment on his "whistle-blowing" claim. The plaintiff "never threatened to report his discovery . . . to a governmental authority, nor did he file a False Claims Act suit until after he was terminated." *Id.* at 193. He never told his supervisors he believed the billing was "illegal" or that it was "fraudulent." *Id.*; *see also McKenzie*, 219 F. 3d at 516-17 (the "in furtherance" requirement requires "more than merely reporting wrongdoing to supervisors").

Thus, "[m]ere dissatisfaction with one's treatment on the job is not, of course, enough. Nor is an employee's investigation of nothing more than his employer's non-compliance with federal or state regulations." *Yesudian*, 153 F. 3d at 740; *see also Brandon v. Anesthesia & Pain Mgmt. Assocs., Ltd.*, 277 F.3d 936, 944 (7th Cir. 2002) (plaintiff failed to establish a "whistle-blowing" claim where he told shareholders he was concerned about their company's Medicare billing practices to try "to convince" them to comply with regulations); *United States ex rel. Ramseyer v. Century Healthcare Corp.*, 90 F.3d 1514, 1523 (10th Cir. 1996) (plaintiff did not establish a claim where

she "regularly communicated" to her superiors information about non-compliance with Medicare billing practices, but "never suggested" she intended to report the noncompliance to the government or gave "any indication" she intended to pursue it further for purposes of a *qui tam* action; rather, concerns she raised were within the scope of her job duties and thus failed to put employer on notice she was acting "in furtherance" of a False Claims Act action).

As the lower courts here explained, Shekoyan's own deposition testimony demonstrated he had not engaged in conduct meeting the "in furtherance" requirement. While Shekoyan claims he raised questions about several matters [Rec. 591-92, 885-95], he admitted he did not know whether there actually were any problems and he raised the questions so Sibley could look into them [Rec. 589-94, 893-95]. Shekoyan also was adamant that he *never* believed Sibley had engaged in fraudulent conduct.[17] (Rec. 595-96)

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[17] For example, Shekoyan testified in deposition that after he spoke with Gary Vanderhoof, Sibley's vice-president at the time, about the fact two branch heads of the Georgian Federation of Professional Accountants and Auditors ("GFPAA") – a recipient of GEAR project funds – appeared to have other full time employment, as well, and why their salaries were not being reported in full, Vanderhoof told him, "don't make too much noise. Let us finish this [contract] extension [with USAID] . . . and then we will deal with whatever issues you have to deal with." (Rec. 594) When asked whether he was concerned enough that he "made noise" about "stealing money," Shekoyan answered: "This is your conclusion. What I thought was that something inappropriate is taking place. We have to either shed light on it to find out what's really going on. . . . " (Rec. 595) When pressed again as to "when" he concluded Sibley was involved in any "corruption," Shekoyan again denied ever coming to such a conclusion: "Absolutely no. I do not agree with this statement. I have never concluded that there was corruption. I thought

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"An employer is entitled to treat a suggestion for improvement as what it purports to be rather than as a precursor to litigation." *Luckey v. Baxter Healthcare Corp.*, 183 F.3d 730, 733 (7th Cir. 1999); *see also Hutchins*, 253 F.3d at 193 (in complaining to supervisor about billing practices, plaintiff "'merely informed a supervisor of a problem and sought confirmation that a correction was made'" (*quoting Zahodnick v. Int'l Bus. Machs. Corp.*, 135 F.3d 911, 914 (4th Cir. 1997)); *McKenzie*, 219 F.3d at 516 (internal reports seeking to have employer comply with federal or state regulations are not conduct "in furtherance of" a False Claims Act action); *Robertson v. Bell Helicopter Textron, Inc.*, 32 F.3d 948, 951-52 (5th Cir. 1994) (plaintiff never gave employer any indication he was raising concerns as part of a fraud investigation that could lead to legal action).

The lower courts properly concluded the most the admissible evidence showed was that Shekoyan raised questions that Sibley was entitled to take at face value – inquiries by an employee who wanted to alert the company to issues that bore further examination so it could make sure it was following applicable rules and regulations. There was *nothing* in either the substance of Shekoyan's inquiries or the way in which they were made that put Sibley on notice he was engaged in conduct "in furtherance" of a False Claims Act action. Accordingly, there is no reason for this Court to revisit the lower courts' application of the established law to the particular record in this case.

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that there were some issues that need to be addressed or corrected or fixed or I don't know, worked out, but I did not conclude that there was a corruption." (Rec. 596)

V. THE CIRCUIT COURT OF APPEALS HAD A FIRM GRASP OF THE ABUSE OF DISCRETION STANDARD

Shekoyan's claim that the Court should grant his petition to expound on the abuse of discretion standard scarcely merits response. The district court acted well within its discretion in refusing to allow him to file a belated motion for summary judgment nine months after discovery closed and the deadline for filing dispositive motions had passed. (App. 1151-52) In addition, while Shekoyan claims his belated motion was based on "new" evidence, the supposedly newly obtained declaration from George Adamia did not "add" anything new for purposes of summary judgment. Shekoyan, himself, characterized the declaration as simply "corroborating" his own claims. (App. 898) Finally, in addition to its other defenses, Sibley disputed Shekoyan's claims of alleged misconduct. (App. 196-203) Accordingly, Shekoyan could not possibly have prevailed on a motion for summary judgment.

The district court also acted well within its discretion in denying his Rule 11 motion for sanctions. Shekoyan's submission of an unnotorized declaration of his attorney purporting to recount the substance of telephone interviews with two former Sibley employees and a "draft," unsigned declaration one of these former employees supposedly had agreed to sign triggered two motions. Sibley moved to strike the improper submissions [Rec. 1326-59, 1360-74], and in conjunction with that motion filed sworn and signed declarations by both individuals stating Shekoyan's lawyer had made a number of misrepresentations in her proffered declaration [Rec. 1361-71]. Shekoyan countered with a Rule 11 motion for sanctions for a litany of perceived wrongs and slights, including

Sibley's failure to notify opposing counsel prior to filing the motion to strike as required by local rule, for bringing a "frivolous" motion to strike and for filing a "frivolous" counter-claim. (Rec. 1978-2031)

In a 15-page order, the district court chronicled each of the parties' contentions and granted in part Sibley's motion to strike, instructed all parties to abide by court rules in the future, and denied Shekoyan's Rule 11 motion for sanctions. (App. 1152-69) The district court acted well within its discretion in this even-handed handling of the parties' string of accusations of improper and bad faith conduct. While Shekoyan complains the court denied his Rule 11 motion without bothering to listen to the tape he submitted to support his claim that one of the declarations submitted by Sibley was "perjured," what the district court did was "refuse" to sort out the cross-accusations and, instead, ruled Shekoyan could use the tape at trial to impeach the witness [App. 1167] – again, a ruling well within the court's discretion.

CONCLUSION

Not only are the questions proffered by Petitioner a step beyond what the record will fairly support, but not one warrants the attention of this Court. The petition for writ of certiorari should be denied.

DATED January 11, 2006.

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